Supreme Court, U.S.
FILED
07-1527 JUN 5 - 2008
OFFICE OF THE CLERK

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No. (1)

In The
Supreme Court of the United States

CITY OF GARLAND, TEXAS,
Petitioner,

v.

ROY DEARMORE, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question expressly reserved by this Court in *Sole v. Wyner*, __ U.S. __ (2007) – whether a party who obtains a preliminary injunction in the absence of a final decision on the merits of a claim for permanent injunctive relief is entitled to prevailing party status so as to permit the award of attorney's fees under federal fee shifting statutes. It is a question that has split and indeed confounded the circuit courts. In this case, the Fifth Circuit held that the fleeting modicum of victory represented by a subsequently mooted preliminary injunction is sufficient. The Fourth and Eighth circuits disagree, relying on this Court's disavowal of the "catalyst theory" in *Buckhannon Board & Care Home v. West Virginia Dept. of Health*, 532 U.S. 598 (2001) as authority for their positions. Still other circuit courts answer the question either "yes" or "sometimes" (or both "yes" and "no") based upon differing tests devised by those circuits, none of which is entirely consistent with the tests created by the other circuits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, the City of Garland, Texas (the "City") is a home-rule municipality created under the constitution and laws of the State of Texas, thus Rule 29.6 does not apply.

Respondents, Roy Dearmore, A.C. Blair, and Marie Combs, (collectively, "Dearmore") were plaintiffs in the district court and appellees in the court of appeals. Dearmore and the others filed suit individually and as putative representatives of a purported class of property owners, property managers, and tenants. No such class or classes were ever certified by the district court, and no appeal was taken from that ruling, so the Respondents are in this Court as individuals only.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A) is published at 519 F.3d 517 (5th Cir. 2008). The order of the district court (Pet. App. E) granting Dearmore a preliminary injunction is reported at 400 F. Supp. 2d 894 (N.D. Tex. 2005). The order of the district court dismissing Dearmore's suit as moot, but nonetheless finding Respondents to be prevailing parties is unreported. (Pet. App. D). The district court's order denying the City's motion to amend that holding is reported at 237 F.R.D. 573 (N.D. Tex. 2006). (Pet. App. C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 10, 2008. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of that judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

The relevant portion of 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000

> [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b)

PRELIMINARY STATEMENT

Dearmore filed a civil action against the City challenging an ordinance passed by the Garland City Council that imposed certain minimum housing standards on single family and multifamily residential rental properties. The ordinance further required inspections of those residences to ensure compliance with the minimum housing standards. The district court dismissed most of Dearmore's claims related to the minimum housing standards. At the same time - but without notice to the parties or a preliminary injunction hearing - the district court granted a preliminary injunction against the City on the sole remaining issue, a provision relating to a residential rental inspection program created by the ordinance. The district court enjoined that provision because, according to the district court, it could imagine hypothetical circumstances in which that provision could be enforced in a manner contrary to the

restraints of the Fourth Amendment. Inasmuch as the City did not intend to implement the inspection program in the manner hypothesized by the district court, the City Council amended the ordinance to address the district court's stated concerns. Thereafter, the case was dismissed as moot. However, in the order dismissing the case, the district court determined that, based on the preliminary injunction, Dearmore was a "prevailing party." The district court then awarded Dearmore attorney's fees and costs. The City appealed that determination and the award of attorney's fees. The Fifth Circuit Court of Appeals affirmed. *Dearmore v. City of Garland,* 519 F.3d 517 (5th Cir. 2008).

STATEMENT OF THE CASE

On June 16, 2005, Dearmore filed an original complaint under 42 U.S.C. § 1983 requesting temporary, preliminary, and permanent injunctive relief challenging Garland Ordinance No. 5895 relating to the maintenance of rental properties within the City. The complaint alleged that various minimum housing standards made applicable by the ordinance to residential rental property, such as requiring working air conditioners and window screens for windows, and ensuring that windows could be opened and used as an exit in the event of a fire, lacked a rational basis and were, therefore, unconstitutional. Dearmore also alleged that the ordinance permitted the warrantless searches of rental units in contravention of the Fourth Amendment of the United States Constitution. Contemporaneously with the filing of the original complaint, Dearmore filed a motion for a temporary restraining order, seeking to

enjoin the City from enforcing the ordinance on Fourth and Fifth Amendment grounds.

The district court considered the motion for temporary restraining order and issued a Memorandum Opinion and Order denying the motion. (Pet. App. F). Dearmore then filed an amended motion for temporary restraining order and a motion to reconsider the district court's denial of the previous motion. Alternatively, Dearmore requested an expedited hearing on his request for a preliminary injunction. The motion *did not* request the district court to issue a preliminary injunction at that time, but rather, only asked the district court to either issue a temporary restraining order, or alternatively, establish an expedited *schedule* for discovery and a hearing on a preliminary injunction. The district court set the motion for a hearing on July 7, 2005.

The day before that hearing, the City filed a motion to dismiss, seeking to dismiss Dearmore's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 7, 2005, the district court held a hearing on Dearmore's motion, after which it issued an order requiring Dearmore to file a response to the City's motion to dismiss by July 13, 2005. In apparent response to what transpired at the hearing and the City's motion to dismiss, Dearmore amended his pleadings, abandoning a number of his claims.

On November 3, 2005, without conducting any other hearings and with no other notice relating to its intentions regarding Dearmore's request for a *hearing* on a preliminary injunction, the district court issued a Memorandum Opinion and Order and Preliminary

Injunction. (Pet. App. E). In that order, the district court granted, for the most part, the City's motion to dismiss. In addition, though, the district court issued a preliminary injunction enjoining the City from enforcing an isolated provision of the challenged ordinance relating to a non-resident owner's consent to inspection of unoccupied single family rental properties. The order continued the preliminary injunction until a trial could be conducted on the merits. The order dismissed all of Dearmore's remaining claims except the provision enjoined. On the same date, the district court issued a scheduling order setting the case for trial on October 2, 2006, and setting a schedule for discovery and other pre-trial preparations.

On November 15, 2005, the Garland City Council amended the ordinance to change the provision called into question by the district court, that is, the portion of the ordinance related to a non-resident owner's consent to inspection of single family rental properties. Because the only issue remaining in the case involved the provision of the ordinance changed by the amendment, the City immediately notified the district court that the ordinance had been amended, and moved to dismiss the case as moot. Dearmore did not oppose the City's request to dismiss the case as moot.

On November 30, 2005, the district court granted the City's motion to dismiss as moot. (Pet. App. D). The order granting the motion, however, found that Dearmore was a "prevailing party" because he had obtained a preliminary injunction. In the accompanying judgment, the district court dismissed the action with prejudice, taxed costs against the City,

and purported to dissolve the injunction – which the district court noted had not become effective in any event (Pet. App. D).[1]

On December 12, 2005, the City filed a motion to amend, requesting that the district court amend the judgment to reflect that Dearmore was not a prevailing party in the litigation and asking the court to re-tax costs against the party incurring same. On August 29, 2006, the district court denied the motion to amend the judgment. (Pet. App. C). On September 6, 2006, following stipulation by the parties as to the amount of fees only, the district court awarded attorney's fees to Dearmore. (Pet. App. B). The City timely appealed. The Fifth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION

A. The Circuit Courts of Appeal Are in Conflict Whether a Preliminary Injunction Constitutes "Relief on the Merits" to Permit "Prevailing Party" Status under Federal Fee Shifting Statutes.

The circuit courts of appeal are in disagreement as to whether a party who obtains only preliminary injunctive relief is a prevailing party for purposes of an

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[1] The district court noted in both the order granting the City's motion to dismiss as moot, and the accompanying judgment, that the injunction had never become effective "because Plaintiff Dearmore never posted the bond as ordered by the Court." (Pet. App. D at 44a, 46a).

award of attorney's fees under federal fee-shifting statutes. The Fourth Circuit Court of Appeals in *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002), *cert. denied* 537 U.S. 825 (2002), held that a preliminary injunction can never form the basis of prevailing party status to support an award for attorney's fees. In sharp contrast, the Fifth Circuit Court of Appeals in this case held that such preliminary relief is sufficient to afford prevailing party status. *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008). Other circuits have likewise breathed new life into the "catalyst theory" rejected by this Court in *Buckhannon Bd. Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) by devising various tests (that differ from circuit to circuit) to find that preliminary injunctive relief may, under some circumstances, form the basis for prevailing party status.

1. The Court of Appeals for the Fourth Circuit has completely rejected preliminary injunctive relief as the basis for awarding attorney's fees under federal fee shifting statutes.

In *Smyth*, the court of appeals held that a preliminary injunction could not meet the prerequisite for prevailing party status under 42 U.S.C. § 1988. *Smyth*, 282 F.3d at 277. The court explained that "[t]he preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated." *Id.* at p. 277, n.8.

Smyth involved recipients of the Aid to Families with Dependent Children (AFDC) program who challenged a new policy requiring an applicant to identify the father of the child for whom benefits were sought, or to list the first and last names of all individuals who might be the father. *Id.* at 271. Some of the applicants for AFDC benefits were unable to identify the fathers of their children, and as a result of the deemed inability to "cooperate," their benefits under the AFDC program were reduced or eliminated. *Id.* The district court entered a preliminary injunction barring the State from enforcing the policy against the plaintiffs. *Id.* at 272. Thereafter, the federal government changed its regulation by relaxing the standard for obtaining a waiver of the identification requirement and modifying its policy to make identification of the fathers prospective only. *Id.* at 273. As a result of the government's changes to the policy, the district court dismissed plaintiffs' claims as moot. *Id.* at 273.

Plaintiffs filed a motion for attorney's fees and costs, which was granted. *Id.* The district court found that because the plaintiffs obtained a preliminary injunction, they had prevailed, and were entitled to attorney's fees. *Id.* The district court awarded the plaintiff nearly $200,000 in fees, and the State appealed the award of fees. *Id.*

The Court of Appeals for the Fourth Circuit found that "[w]hile granting such an injunction does involve an inquiry into the merits of a party's claim, ... the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Id.* at 276. Examining the standard for granting a preliminary injunction, the

court explained that a party is not required to succeed on the merits of their claim at that stage. "The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Id.* at 276.

The Fourth Circuit noted that to prevail at the preliminary injunction stage, a plaintiff must only demonstrate a strong showing or a substantial likelihood of success by clear and convincing evidence to obtain relief. *Id.* at 276. In addition, in the preliminary injunction context, the court is required to weigh other factors in addition to the merits inquiry, that is, irreparable harm to the plaintiff, public policy considerations, and the balance of harm to plaintiff weighed against harm to the defendant. *Id.* at 276-277. The Fourth Circuit observed that the "interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[] on the merits' or something akin to one for prevailing party purposes." *Id.* at 277, citing *Buckhannon*, 532 U.S. at 604, and therefore disallowed an award of attorney's fees to the plaintiffs.

Thus, the Fourth Circuit, recognizing the limited nature of review and other considerations inherent in a decision to grant a preliminary injunction, correctly found that such a decision is not a decision on the merits within the meaning of *Buckhannon* and does

not confer prevailing party status. In contrast, the Fifth Circuit's decision in the instant case, with which other circuit courts generally agree, holds instead that preliminary injunctive relief may be relief on the merits for purposes of evaluating prevailing party status. *Dearmore*, 519 F.3d at 524.

2. The Court of Appeals for the Fifth Circuit has held that preliminary injunctive relief, without relief on the merits, is sufficient to establish prevailing party status under federal fee shifting statutes.

In the instant case, the district court awarded attorney's fees to Dearmore because Dearmore obtained a preliminary injunction order despite having failed to obtain final relief on the merits of his claims. *Id.* at 526. The district court found that the order granting preliminary relief afforded Dearmore prevailing party status, and that he was thus entitled to attorney's fees. *Id.* at 524. The Fifth Circuit recognized that the issue had not been decided by this Court and that the circuit courts have applied less than uniform standards in deciding the question. *Id.* at 521. Nevertheless, the Fifth Circuit affirmed the district court's order and determined that Dearmore was a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Id.* at 526. In affirming, the Fifth Circuit created a three part test to determine "prevailing party" status. The plaintiff:

> (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in

> favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits.

Id. at 524.

In allowing Dearmore to be a prevailing party, the Fifth Circuit disregarded this Court's recognition in *University of Texas v. Camenisch,* 451 U.S. 390 (1981), of the necessarily abbreviated nature of a preliminary injunction hearing. The decision of the Fifth Circuit would effectively convert a proceeding that by its very nature is not intended to result in a final judgment into the equivalent of a trial on the merits. This is particularly true where, as here: (1) the district court did not notify the parties that it was considering a preliminary injunction, (2) the district court did not hold a preliminary injunction hearing, and (3) the district court accepted the well pleaded facts of Dearmore's complaint as true.

3. Treatment of this issue by the other circuit courts of appeals is equally inconsistent.

Several other circuit courts of appeal have considered the question presented in this case. Those courts are split both as to whether a preliminary injunction is sufficient to confer such status and, even amongst those that have ruled a preliminary injunction may sometimes be enough, they differ in their reasoning as to when and why.

For example, the Eighth Circuit, in *Advantage Media, L.L.C. v. City of Hopkins,* 511 F.3d 833, 838

(8th Cir. 2008), *cert. denied*, __ U.S. __, 76 U.S.L.W. 3557 declined to find a party who had obtained a preliminary injunction, followed by a change in the municipal ordinance which mooted the case, to be a "prevailing party" under federal fee shifting statutes. In that case, the district court granted a preliminary injunction against the enforcement of a municipal sign ordinance, finding that plaintiff had demonstrated a "substantial likelihood of success on the merits. . ." *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1046 (D. Minn. 2005). In response to the injunction the city enacted a new permanent sign ordinance. *Advantage Media*, 511 F.3d at 835. The new sign ordinance cured the constitutional infirmities that formed the basis of Advantage's lawsuit. *Id.* Following resolution of plaintiff's other claims, the district court denied plaintiff's motion for attorney's fees. *Id.* The plaintiff appealed, and the Eighth Circuit held that the plaintiff was not a prevailing party entitled to attorney's fees. *Id.* at 839. The court reasoned that, although the lawsuit resulted in the city's alteration of several potentially unconstitutional provisions of the sign ordinance, that alone was insufficient under this Court's opinion in *Buckhannon* to make the plaintiff a prevailing party. *Id.* at 838.

Other circuit courts have held that a party that obtains a preliminary injunction may be a "prevailing party" where the injunction itself acts to render the case moot. For example, in *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), the Ninth Circuit granted attorney's fees in a case where the injunction sought by the plaintiff granted him all of the relief he would have obtained after trial by a final judgment on the

merits. In that case, the plaintiff, a deputy sheriff, sought to enjoin the County of Riverside from using a report against him in an administrative termination proceeding on the ground that the report had allegedly been obtained unlawfully. *Id.* at 1094. The district court granted the preliminary injunction and the administrative termination proceeding was held without the report. *Id.* All of the remaining issues in the case were disposed of, and the case became moot once the administrative hearing had been held in the manner sought by plaintiff. *Id.*

The Ninth Circuit found that the plaintiff was entitled to attorney's fees because the relief he obtained as a result of the court's order – an administrative hearing without the use of the report – was the precise relief he sought in the lawsuit. *Id.* Indeed, the court specifically noted that the county did not "voluntarily" decide not to use the report in the administrative proceeding - it was prevented from doing so because the district judge said it could not. *Id.* at 1096 ("In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason only: because Judge Timlin said so.") The court pointed out that the plaintiff, "obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit." *Id.*

In *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), the plaintiff brought an action against the Secretary of Agriculture regarding a separate price class for certain dairy products. The plaintiff obtained a preliminary injunction halting the implementation of the regulations and the Department of Agriculture changed the regulations, thereby

mooting the case. *Id.* at 943. The D.C. Circuit, in allowing the award of attorney's fees to the plaintiff, gleaned a three prong test from the *Buckhannon* decision. *Id.* at 946-947. The court explained that "*Buckhannon* embraces three core principles for construing the term 'prevailing party' in federal fee shifting statutes: . . ." *Id.* The three principles are that: (1) plaintiff must show a change in the legal relationship; (2) judgment must be rendered in the party's favor; and, (3) there must be some judicial relief as opposed to merely a judicial pronouncement. *Id.* The D.C. Circuit Court further explained,

> "In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make a plaintiff a 'prevailing party' under a fee shifting statute like the EAJA. Therefore, *Buckhannon* surely does not endorse a per se rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a 'prevailing party' under the EAJA."

Id. at 945.

In applying the three prong test discussed above, the circuit court focused on the district court's finding that Milk Producers "undoubtedly would have succeeded on the merits." *Id.* at 948. "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt." *Id.* In other words, the

court's prediction of success on the merits at the preliminary injunction stage was sufficient to confer prevailing party status.

In *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997), the Second Circuit Court of Appeals adopted the approach that a decision to award a preliminary injunction can establish prevailing party status if the determination is made on the merits. In that case, legislative employees brought an action against the governor and state of New York, claiming that their constitutional and statutory rights were violated by the governor's withholding of their biweekly salary payments from an appropriations bill pending passage of the state budget. *Id.* at 480. The district court issued a preliminary injunction requiring the payments to continue during the pendency of the action. *Id.* Before the case could be decided on the merits, the state passed a budget thereby mooting the case. *Id.* The district court found that the plaintiffs were prevailing parties and awarded attorney's fees based upon their success in obtaining a preliminary injunction. *Id.* at 481. The governor appealed. The Second Circuit, in allowing the award of attorney's fees held that, "we do not automatically require a denial of attorney's fees when a party receives a stay or preliminary injunction but never obtains final judgment. . ." *Id.* at 483. "Instead, a decision to award attorney's fees requires an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits." *Id.* Moreover, the court explained that "[a] determination of whether a court's action is governed by its assessment of the merits 'requires close analysis of the decisional circumstances and reasoning underlying the grant of

preliminary relief.'" *Id.* at 483, (quoting *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994)).

Although a determination of entitlement to preliminary relief can include an examination of the merits, a preliminary injunction may be granted by the mere showing of a likelihood of success on the merits. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). According to some circuit courts of appeal, with the exception of the Fourth and possibly Eighth circuits, if a party prevails even on the lesser standard of "likelihood of success," the party may, nonetheless, be considered a prevailing party entitled to attorney's fees. That standard is inconsistent with this Court's previous holdings that the standard must be success on the merits. *Buckhannon*, 532 U.S. at 604; *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672 (1987).

B. The Courts That Have Held Success on a Preliminary Injunction Alone to be Sufficient to Make the Recipient of the Injunction a Prevailing Party Have Resurrected the "Catalyst Theory" Abandoned by this Court in *Buckhannon*.

To see how the Fifth Circuit's decision in *Dearmore* merely revives the catalyst theory, the Court need look no further than the judicially enforceable result that Dearmore took from the courthouse and compare that result with the result in *Buckhannon*. Dearmore, like the plaintiffs in *Buckhannon*, left the courthouse at the end of the day with nothing. The problem with the catalyst theory, as recognized by this Court in *Buckhannon*, is that the plaintiff in such cases has not truly "prevailed" because the plaintiff lacks the means

of ensuring by judicial imprimatur the change in law brought about by the lawsuit. *See Buckhannon* at 605 ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.") Dearmore is in the identical position; he left the courthouse – as did the plaintiffs in *Buckhannon* – without any means of enforcing the City Council's voluntary change in conduct. Unlike *Buckhannon*, however, the ordinance that Dearmore wanted stricken down was, for the most part, still very much intact.

The resurrection of the catalyst theory in any form creates the very sort of problems that led this Court to disavow that doctrine in *Buckhannon*. The City in this case did what it thought was reasonable and right, and what was fair to the district court, the plaintiff, and the taxpayers who foot the bills for the City: instead of waging a fight over the validity of the provision the district court found to be constitutionally suspect, the City changed that provision - a provision that was a small part of a larger, comprehensive ordinance, a provision that the City never intended to implement in the manner hypothesized by the district court in any event. In short, the City believed that it could modify the ordinance in a manner that would address the district court's concerns without doing violence to its single family rental program, and thereby save the time, effort, and expense that continued litigation would have entailed.

Opinions like the Fifth Circuit's decision in *Dearmore* will remove that option, forcing defendants to litigate to the bitter end something that may be of

absolutely no moment to the defendant. This Court's decision in *Buckhannon* acknowledged that very mischief by recognizing the disincentive that the "catalyst theory" would have on a defendant's decision to voluntarily change its conduct. *See Id.* at 608 (noting that a defendant's potential liability for attorney's fees may be as significant as, if not more than, potential liability on the merits, and acknowledging that the possibility of being assessed attorney's fees may well *deter* a defendant from altering its conduct in the manner sought by the plaintiff). To the extent the abandonment of the catalyst theory was meant to encourage a defendant to give the plaintiff at least some of the relief the plaintiff seeks, the same holds true with any form of relief short of a judgment on the merits or a consent decree. Whatever the form of "catalyst," whether it be the mere filing of a lawsuit or a preliminary opinion of a district court, if a defendant finds itself facing an inevitable award of attorney's fees by capitulating even a little, it has no alternative but to continue a battle over something it would otherwise have never contested. That sort of fight is the type of needless, collateral litigation this Court has cautioned against creating in *Buckhannon* and other cases. *See Buckhannon* at 609 ("We have accordingly avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'")(quoting *Texas State Teacher's Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989)).

The effective revival of the catalyst theory by the Fifth Circuit and other courts not only invites that sort of needless litigation, it compels it. In its opinion, the

Fifth Circuit noted that "when a defendant moots an action in response to the district court's preliminary injunction order, the defendant will have generally acceded to the order and thus will not have appealed. *This lack of appeal by a defendant has been noted by this Court and others to be a factor favoring a finding of prevailing party status.*" *Dearmore*, 519 F.3d at 524, n.3 (emphasis added). Thus, in order to avoid any sort of implication that the defendant somehow concedes prevailing party status for the plaintiff, the defendant must continue what is otherwise an unwanted fight through every level. Indeed, the Fifth Circuit would apparently have required the City to engage in full-fledged combat in the district court, then on appeal of the preliminary injunction, and then, quite possibly, on appeal again from the district court's final order – all arising from the hypothetical application of a provision of an ordinance which was neither material or necessary to protect the goals of the ordinance as originally intended.

CONCLUSION

Since this Court's opinion in *Buckhannon*, the circuit courts have wrestled with the question of whether, and under what circumstances, a preliminary injunction, without a final judgment, can serve as the basis for prevailing party status under federal fee shifting statutes. It is a recurring problem that has not only created a split in the circuits as to the "yes" or "no" of the question, but inconsistencies, as well, among those circuits that allow a preliminary injunction to satisfy *Buckhannon's* requirement of a "final judgment or consent decree."

Moreover, those circuits that allow a preliminary injunction to confer prevailing party status have strayed from this Court's holding in *Buckhannon* by allowing a party that leaves the courthouse with only preliminary relief – without having obtained a final judgment or court ordered consent decree – to nevertheless receive attorney's fees as a prevailing party. As was aptly observed by Judge Henderson in his dissent in *Select Milk Producers*, "[t]he words 'preliminary' and 'prevailing' are not ones that easily fit together." *Select Milk Producers*, 400 F.3d at 962 (Henderson, J., dissenting). The Court should not allow the catalyst theory rejected in *Buckhannon* to reappear in the form created in some of the circuit courts by equating the words "preliminary" and "prevailing."

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

R. Bradford Neighbor
City Attorney
Counsel of Record

Michael J. Betz
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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-11007

[Filed March 10, 2008]

ROY DEARMORE, Individually and as Representative of all Owners of Single Family Residential Property in Garland, Texas; A C BLAIR, Individually and as Representative of all Property Managers in Garland, Texas; MARIE COMBS, Individually and as Representative of all Tenants of Single Family Residential Property in Garland, TX	)
Plaintiffs-Appellees	)
v.	)
CITY OF GARLAND	)
Defendant-Appellant	)

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges. EDITH BROWN CLEMENT, Circuit Judge:

Defendant-Appellant City of Garland ("the City") appeals from the district court's order awarding attorney's fees to Plaintiffs-Appellees Roy Dearmore, A.C. Blair, and Marie Combs (collectively "Dearmore"), under 42 U.S.C. § 1988(b). This statute authorizes an award of attorney's fees to a "prevailing party" in an action to enforce the provisions of certain federal statutes, including 42 U.S.C. § 1983. The City also appeals from the district court's order denying its motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). Because we conclude that Dearmore is a prevailing party and the district court committed no reversible error in its Rule 59(e) order, we affirm.

I. FACTS AND PROCEEDINGS

On June 16, 2005, Dearmore filed a complaint against the City under 42 U.S.C. § 1983, challenging the constitutionality of Garland City Ordinance No. 5895 ("the Ordinance"), which related to the maintenance of rental properties in the City. The complaint alleged that various minimum housing standards and inspection procedures contained in the Ordinance violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. That same day, Dearmore filed a motion for a temporary restraining order, seeking to enjoin the City from enforcing the Ordinance.

On June 25, 2005, the district court denied Dearmore's motion for a temporary restraining order. In response, on July 1, 2005, Dearmore filed an amended motion for a temporary restraining order and a motion to reconsider its denial of the temporary restraining order, or in the alternative, a request for an expedited preliminary injunction hearing. On July 6, 2005, the City filed a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Dearmore's complaint for failure to state a claim. Thereafter, Dearmore amended his complaint and removed his Fifth and Fourteenth Amendment takings and due process claims. Thus, Dearmore's amended complaint alleged only that the Ordinance authorized warrantless searches of private homes, failed to provide a mechanism to notify tenants, property owners, or property managers of their right to refuse a search, and required applicants to disclose personal information, all in violation of the Fourth and Fourteenth Amendments. Dearmore's amended complaint sought a declaratory judgment, injunctive relief, and attorney's fees and costs.

On November 3, 2005, the district court granted Dearmore's motion for a preliminary injunction.[1] In its order, the district court held that in so far as the Ordinance allowed inspections and searches of unoccupied property, it violated a property owner's Fourth Amendment right to be free from unreasonable

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[1] The district court construed Dearmore's amended motion for a temporary restraining order as a motion for a preliminary injunction, because Dearmore had requested a preliminary injunction in his amended complaint.

searches and seizures. As a result, the district court issued a preliminary injunction enjoining the City from enforcing section 32.09(F) of the Ordinance, which required a property owner who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, or penalizes the lessor for refusing to allow an inspection.[2] The district court also dismissed Dearmore's other Fourth Amendment claims. On the same date, the district court issued a scheduling order establishing discovery deadlines and setting the case for trial on October 2, 2006.

Following the issuance of these orders on November 3, 2005, counsel for the City informed counsel for Dearmore that he did not need to post the bond necessary to enforce the preliminary injunction because the City planned to amend the Ordinance to address the district court's order. On November 15, 2005, the Garland City Council amended the Ordinance, removing the provisions related to a nonresident owner's consent to the inspection of single-family rental properties and clarifying the circumstances under which the City may seek a warrant to inspect such properties when consent has been refused or could not be obtained. The City notified the district court of this amendment and filed a motion to dismiss Dearmore's action as moot, which

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[2] The Ordinance provided for criminal penalties for certain violations. Specifically, the Ordinance made it an offense if an owner rented property without a permit. It also made it an offense if an owner refused to allow an inspection by the City. The fines for both offenses were up to $2000 per day.

Dearmore did not oppose. On November 30, 2005, the district court granted the City's motion and entered final judgment dismissing the case as moot and with prejudice. The order granting this motion found that Dearmore was a "prevailing party" and awarded him attorney's fees and costs under 42 U.S.C. § 1988(b).

On December 12, 2005, the City filed a motion to alter or amend judgment pursuant to Rule 59(e), requesting that the district court not designate Dearmore as a prevailing party and asking that the court re-tax costs against the parties incurring them. On December 13, 2005, Dearmore filed a motion for attorney's fees pursuant to Rule 54(d)(2). On August 29, 2006, the district court denied the City's motion to alter or amend judgment. On September 6, 2006, following a stipulation by the parties as to the amount of fees only, the district court granted Dearmore's motion for attorney's fees. The City appeals both rulings.

II. STANDARD OF REVIEW

The district court has broad discretion to award attorney's fees under § 1988(b). *See Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000). In evaluating whether the district court abused its discretion to award attorney's fees, this Court reviews the factual findings supporting the grant or denial of attorney's fees for clear error and the conclusions of law underlying the award *de novo*. *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 482 (5th Cir. 2006). "[T]he characterization of prevailing-party status for awards under fee-shifting statutes such as § 1988 is a legal question subject to *de novo* review." *Bailey v.*

Mississippi, 407 F.3d 684, 687 (5th Cir. 2005). The denial of a motion to alter or amend judgment under Rule 59(e) is reviewed for abuse of discretion. *Molina v. Equistar Chems. LP*, No. 06-41574, 2008 WL 104077, at *2 (5th Cir. Jan. 10, 2008) (unpublished). "However, to the extent that a ruling was a reconsideration of a question of law . . . the standard of review is *de novo.*" *Id.* (internal quotations omitted). This appeal presents a question of law that is reviewed *de novo*.

III. DISCUSSION

In § 1988(b), Congress created an exception to the "American Rule" that litigants pay for their own attorney's fees. *See Sole v. Wyner*, 127 S. Ct. 2188, 2191 (2007); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). This section provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). This appeal presents an issue of first impression in this Circuit: Whether a plaintiff qualifies as a "prevailing party" under § 1988(b) when he obtains a preliminary injunction after the district court makes an unambiguous indication of probable success on the merits of his claim and the defendant subsequently moots the case before trial in direct response to the court's preliminary injunction order.

Supreme Court and Fifth Circuit precedent provide general guidance on the qualifications for prevailing party status. The Supreme Court has noted that "'[t]he touchstone of the prevailing party inquiry' . . . is 'the

material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" *Sole*, 127 S. Ct. at 2194 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)); *see Buckhannon*, 532 U.S. at 603 (explaining that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims" (internal quotations omitted)). Such a material alteration must have the "necessary judicial *imprimatur*." *See Buckhannon*, 532 U.S. at 605. The *Buckhannon* Court did not expressly define "judicial *imprimatur*" but stated that enforceable judgments on the merits and consent decrees are sufficient for prevailing party status. *Id.* at 604. In so holding, the *Buckhannon* Court rejected the "catalyst theory," explaining that a defendant's voluntary change in conduct in response to the plaintiff's lawsuit and not a court order, although perhaps accomplishing what the plaintiff sought to achieve, lacks the necessary judicial *imprimatur* to establish prevailing party status. *Id.* at 601, 605. This Court considered such Supreme Court precedent in *Energy Management* and held that, to be a prevailing party, a plaintiff must "(1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." 467 F.3d at 482.

Although an enforceable judgment on the merits and a court-ordered consent decree have sufficient judicial *imprimatur*, these examples are not exclusive. *See Buckhannon*, 532 U.S. at 605 (referencing the

judgment on the merits and consent decree as mere "examples"); *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003); *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753-54 (6th Cir. 2002); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). As a result, lower courts have had difficulties in ascertaining what other forms of judicial action have the "necessary judicial *imprimatur*" to create prevailing party status, particularly in the context of preliminary injunctions. The Supreme Court has never expressed a view "on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may . . . warrant an award of counsel fees." *Sole*, 127 S. Ct. at 2196. Without a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 480 F.3d 734, 740-41 (5th Cir. 2007). As this Court has noted,

> several circuits have determined that a preliminary injunction that merely preserves the status quo temporarily will not confer "prevailing party" status on a party; instead, the preliminary injunction must (i) reflect a merits-based decision on an issue involved in the case, *see, e.g., John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558-59 (3d Cir. 2003); *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753 (6th Cir. 2002); *Taylor v.* City *of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir.

> 1987); (ii) constitute substantive, indefeasible relief akin to final relief on the merits because, for example, "the party's claim [for a] permanent injunction is rendered moot by the impact of the preliminary injunction," *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006); *see also, e.g., Dupuy v. Samuels*, 423 F.3d 714, 719, 723 (7th Cir. 2005); (iii) grant the party concrete and irreversible relief in a merits-based decision that vindicates the party's claim and is not appealed by the opposing party, *see, e.g., Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 947-48 (D.C. Cir. 2005); or (iv) incorporate some combination of these factors.

Yousuf v. Motiva Enters. LLC, 246 F. App'x 891, 894 (5th Cir. 2007) (per curiam) (footnotes omitted) (citing *Planned Parenthood*, 480 F.3d at 740-41). "The Ninth Circuit has . . . taken a relatively generous approach, at least in principle, stating that a 'preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*.'" *Planned Parenthood*, 480 F.3d at 741 (quoting *Watson*, 300 F.3d at 1096). The Ninth Circuit, however, did note that a plaintiff would not qualify as a prevailing party if he obtained a preliminary injunction early in the litigation but later lost on the merits and had a judgment entered against him. *Id.* (citing *Watson*, 300 F.3d at 1096). "By contrast, the Fourth Circuit has expressed strong skepticism that a preliminary injunction could ever serve as the basis for prevailing party status," because "'the merits inquiry in the preliminary injunction contest is necessarily

abbreviated.'" *Id.* (quoting *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002)).

This Court has not yet created or endorsed a particular test. Instead, this Court has held that a plaintiff who obtains a preliminary injunction is not a prevailing party if he fails to qualify under any of the other circuits' tests. In *Planned Parenthood*, the plaintiffs alleged in part that Rider 8, a statute that prohibited the distribution of federal family funds to those who performed elective abortion procedures or who contracted or provided funds to those who perform such procedures, violated the Supremacy Clause. 480 F.3d at 736-37. The district court granted the plaintiffs' motion for a preliminary injunction, enjoining enforcement of Rider 8, and the defendant appealed. *Id.* at 737. On interlocutory appeal, this Court determined that Rider 8 did not violate the Supremacy Clause and remanded the case, with instructions to dissolve the injunction. *Id.* On remand, the district court granted the defendant's motion to dismiss the case and denied the plaintiffs attorney's fees. *Id.* The plaintiff's appealed the denial of fees. *Id.* This Court held that the plaintiffs were not prevailing parties because (1) the preliminary injunction involved an abbreviated inquiry into the merits coupled with a weighing of likely harms, (2) the preliminary injunction only preserved the status quo between the parties, (3) the case was not mooted after the preliminary injunction was granted and the defendant appealed, and (4) on remand, the plaintiffs did not seek to avoid the dissolution of the injunction and eventually lost on the merits. *Id.* at 741-42. Under these facts, this Court had no need to choose between the tests of the other circuits because the plaintiffs

clearly failed to qualify under any of them. *See id.* at 741.

Likewise, in *Yousuf,* this Court held that the plaintiff was not a prevailing party because he did not qualify under any test. 246 F. App'x at 894. The plaintiff, who leased and operated a Shell service station pursuant to a franchise agreement with the defendant, filed suit after the defendant notified him of its intent to terminate the franchise relationship. *Id.* at 892. After suit was filed, the parties executed a "Stipulated Standstill Agreement," where they agreed to maintain the status quo of the franchise relationship pending the district court's decision on the preliminary injunction, which the district court adopted as an order of the court. *Id.* As discovery progressed, the parties reached another agreement and filed a joint stipulation and motion for the entry of a consent judgment on the plaintiff's preliminary injunction motion. *Id.* The district court, in accordance with the stipulation and motion, issued the preliminary injunction maintaining the franchise relationship, but the order stated that the court made no findings of fact or law on the motion. *Id.* at 892-93. Before the case could proceed to a jury trial, Hurricane Katrina destroyed the service station, and the defendant terminated the franchise agreement. *Id.* at 893. The plaintiff then moved to dismiss the case as moot and filed for attorney's fees under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, based on the entry of the standstill agreement and preliminary injunction. *Id.* The district court denied the attorney's fees, and plaintiff appealed. *Id.* On appeal, this Court affirmed the district court and determined that the plaintiff was not a prevailing

party because (1) the preliminary injunction did nothing more than "temporarily preserve the status quo, maintaining the parties' preexisting franchise relationship until the legal issues surrounding the approaching termination of that relationship could be addressed on the merits," (2) the district court did not consider the merits of plaintiff's claim and explicitly noted that it had not made any findings of fact or conclusions of law in its order granting the preliminary injunction per the parties' agreement, and (3) the plaintiff's claim became moot "not because the court orders were so successful for [the plaintiff] that they rendered any further relief unnecessary, but rather because of the unrelated impact of Hurricane Katrina." *Id.* at 894-95.

Unlike *Planned Parenthood* or *Yousuf,* this case does not fail every test employed by the other circuits. As noted, the Sixth Circuit provides that a plaintiff is a prevailing party if the preliminary injunction represents an "unambiguous indication of probable success on the merits, and not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff." *Dubuc*, 312 F.3d at 753 (internal quotations omitted). Likewise, the Seventh Circuit states that a plaintiff may obtain attorney's fees when the district court engaged in a discussion on the merits of the claim when considering a preliminary injunction motion, and the case was mooted after the plaintiffs were granted a preliminary injunction but before they requested attorney's fees. *See Dupuy*, 423 F.3d at 722-23. Further, the Ninth Circuit holds that a plaintiff is entitled to attorney's fees if he obtained a preliminary injunction and the case was subsequently mooted. *See Watson*, 300 F.3d

at 1096. Here, the district court considered the merits of Dearmore's claim and clearly concluded that a provision of the Ordinance violated the Fourth Amendment. In response to the district court's grant of this preliminary injunction, the City amended the offending provision of the Ordinance, thereby mooting the case. Under these facts, at a minimum, it appears that Dearmore qualifies as a prevailing party under the Sixth, Seventh, and Ninth Circuits' tests. As a result, we are not required to reverse the district court's grant of attorney's fees to Dearmore under *Planned Parenthood*, 480 F.3d at 740-42, or *Yousuf*, 246 F. App'x at 894.

The City urges this Court to hold that Dearmore is not a prevailing party because the preliminary injunction simply maintained the status quo until trial, did not provide final relief on the merits, and did not materially alter the legal relationship between the parties. The City contends that it changed its position by amending the offending provision of the Ordinance voluntarily, not because the preliminary injunction required it to do so. Dearmore, on the other hand, argues that he is a prevailing party because he won a preliminary injunction sufficiently grounded in the merits, which provided him with some judicial relief. Dearmore also asserts that the grant of the preliminary injunction and the City's subsequent amendment of the offending portion of the Ordinance represents a judicially-sanctioned material change in the legal relationship between the parties.

The position urged by the City is simply not compelled by *Buckhannon*. Contrary to the City's argument, *Buckhannon* does not stand for the

proposition that a defendant should be allowed to moot an action to avoid the payment of the plaintiff's attorney's fees when a district court grants a preliminary injunction based upon an unambiguous indication of probable success on the merits. Instead, we agree with Dearmore that this preliminary injunction, coupled with the City's subsequent mooting of the case, is sufficient to establish prevailing party status.

Under these facts, to qualify as a prevailing party under § 1988(b), we hold that the plaintiff (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits.[3] Such a test satisfies *Buckhannon*, because it requires that a party obtain a judicial ruling which results in a material change in the legal relationship between the parties. It also does not implicate the "catalyst theory," which the Supreme Court struck down in *Buckhannon*, because this test grants prevailing party status only when the defendant moots

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[3] Although not part of our test, we note that when a defendant moots an action in response to the district court's preliminary injunction order, the defendant will have generally acceded to the order and thus will not have appealed. This lack of an appeal by a defendant has been noted by this Court and others to be a factor favoring a finding of prevailing party status. *See, e.g., Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 480 F.3d 733, 741-42 (5th Cir. 2007); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005).

the plaintiff's action in response to a court order, not just in response to the filing of a lawsuit. Likewise, it complies with the general prevailing party standard announced by this Court in *Energy Management,* 467 F.3d at 482.

Dearmore clearly satisfies the three-prong test for prevailing party status announced herein. First, it is undisputed that the district court granted Dearmore a preliminary injunction–an enforceable judgment–by court order on November 3, 2005. Thus, Dearmore has satisfied the first prong of the test.

Second, the district court granted the preliminary injunction based upon its assessment that Dearmore would likely succeed on the merits of his Fourth Amendment claim, not because of any balancing of the equities in his favor. *See Dubuc,* 312 F.3d at 753 (holding that a plaintiff is entitled to prevailing party status when he obtains a preliminary injunction based upon the merits of his claim); *Haley v.* Pataki, 106 F.3d 478, 483 (2d Cir. 1997) (holding that "[w]hen a party receives a stay or preliminary injunction but never obtains a final judgment, attorney's fees are proper if the court's action in granting the preliminary injunction is governed by its assessment of the merits"); *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987) (stating that "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees"). In its order, the district court clearly informed the City that certain provisions of its Ordinance violated the Fourth Amendment, stating:

> Inspections and searches of unoccupied property would clearly infringe on the property owner's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure. In these limited situations, where the property is unoccupied, the protections guaranteed by the Fourth Amendment to the United States Constitution to the property owner outweigh any interest that the government has in protecting the health, safety or welfare of the public. . . . The ease with which the City could acquire an administrative search warrant makes unnecessary the need for the City to require property owners to forego in advance their rights guaranteed by the Fourth Amendment. The court fully understands that the City has a valid and important governmental interest in protecting the public, however, the court sees no reason why this should be done at the expense of infringing on rights guaranteed by the Fourth Amendment to the United States Constitution.

Dearmore v. City of Garland, 400 F. Supp. 2d 594, 903 (N.D. Tex. 2005). Although the district court indicated that it was "viewing [the facts] in the light most favorable to Dearmore" and that Dearmore was likely to prevail, *see id.* at 904, this language was used to conform to the standard necessary for the issuance of a preliminary injunction. Therefore, this is not a case where the preliminary injunction was based less on the district court's view of the merits than on a perceived hardship to the plaintiff. Rather, the district court's grant of the preliminary injunction was clearly

merit-based, and thus Dearmore has satisfied the second prong of the test.

Third, the district court's grant of the preliminary injunction directly caused the City to amend the offending portion of the Ordinance, thereby mooting the case and preventing Dearmore from obtaining final relief on the merits. We note that this is not a case in which the City voluntarily changed its position *before* judicial action was taken. Indeed, if the City had mooted the case through amending the Ordinance before the court granted the preliminary injunction, then Dearmore could not qualify as a prevailing party under *Buckhannon* because it would have improperly invoked the "catalyst theory." The City, however, mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link between the district court's issuance of the preliminary injunction and the City's subsequent amendment of the Ordinance to moot the case. Almost immediately following the district court's issuance of the preliminary injunction, counsel for the City informed counsel for Dearmore that Dearmore need not post the bond to enforce the injunction, because the City planned to amend the Ordinance to address the district court's concerns. Twelve days after the district court issued the injunction, the Garland City Council amended the provision of the Ordinance that the district court held to be violative of the Fourth Amendment. Dearmore

has satisfied the third prong of the test, and thus he is entitled to attorney's fees and costs under § 1988(b).[4]

In support of our holding, we note that the merits-based preliminary injunction here, coupled with the City's mooting of the action in direct response to the injunction, caused a material alteration in the legal relationship between the parties. The fact that Dearmore never obtained a final judgment on the merits does not affect our ruling, as a final judgment is not required. We, like the District of Columbia Circuit, conclude that "*Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree [which does not always include an admission of liability), may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the plaintiff a 'prevailing party' under a fee-shifting statute." *Select Milk Producers*, 400 F.3d at 945. This is such a case. When the district court granted the preliminary injunction, it provided Dearmore with the interim judicial relief that he requested–it blocked the City from enforcing the portion of the Ordinance that violated the Fourth Amendment. Because of this injunction, the City could

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[4] We note that the test we articulate here is only applicable in the limited factual circumstances described above. By its terms, it only applies when a plaintiff obtains a preliminary injunction based on an unambiguous indication of probable success on the merits, which causes the defendant to moot the action, thereby preventing the plaintiff from obtaining final relief on the merits. As a result, this test does not signal any disagreement with the approaches adopted by the other circuits, with the exception of the Fourth Circuit.

not conduct warrantless searches or impose criminal penalties for noncompliance under the offending provision of the Ordinance. When the City modified its behavior in direct response to the injunction and mooted the case, it ultimately provided Dearmore with his desired result. Dearmore was never subjected to section 32.09(F) of the Ordinance, which is what he sought. Such a situation satisfies *Buckhannon* and justifies conferring prevailing party status to Dearmore under these facts.

IV. CONCLUSION

The district court's award of attorney's fees and denial of the City's Rule 59(e) motion is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-11007
D.C. Docket No. 3:05-CV-1231

[Filed March 10, 2008]

ROY DEARMORE, Individually and as Representative of all Owners of Single Family Residential Property in Garland, Texas; A C BLAIR, Individually and as Representative of all Property Managers in Garland, Texas; MARIE COMBS, Individually and as Representative of all Tenants of Single Family Residential Property in Garland, TX	)
Plaintiffs-Appellees	)
v.	)
CITY OF GARLAND	)
Defendant-Appellant	)

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APR 01 2008

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/
Deputy APR 01 2008

New Orleans, Louisiana

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed September 6, 2006]

ROY DEARMORE, individually and as Representative of all Owners of Single Family Residential Property in Garland, Texas; MARIE COMBS, individually and as Representative of all tenants of Single Family residential property in Garland, Texas, and A. C. BLAIR, individually and as Representative of all property managers in Garland, Texas

Plaintiffs,

vs.

CITY OF GARLAND

Defendant.

AGREED ORDER CONCERNING ATTORNEYS'S FEES

The Court previously issued a memorandum opinion that Plaintiffs are entitled to attorneys fees in this cause. The parties have agreed and stipulated that $8,500 is a reasonable and necessary attorney's fee. The Court finds that such amount is a reasonable and necessary fee. [handwritten notation: Accordingly, the court grants Plaintiffs' motion for attorney's fees, filed December 13, 2005. SAL]

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that Plaintiff Roy Dearmore recover of and from Defendant City of Garland $8,500 as reasonable and necessary attorney's fees.

SIGNED this 6th day of September, 2006.

/s/
SAM A. LINDSAY
United States District Judge

APPROVED AND AGREED AS TO THE AMOUNT OF ATTORNEY'S FEES:

/s/
MICHAEL BETZ
Attorney for the City of Garland

/s/
ROBERT A. MILLER
Attorney for the Roy Dearmore

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed August 29, 2006]

ROY DEARMORE, individually and as Representative of all owners of Single Family residential property in Garland Texas, **MARIE COMBS**, individually and as Representative of all tenants of Single Family residential property in Garland, Texas, and **A. C. BLAIR**, individually and as Representative of all property managers in Garland, Texas,	)
Plaintiffs,	)
v.	)
CITY OF GARLAND,	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

Before the court is Defendant's Rule 59(e) Motion to Amend Judgment, filed December 12, 2005. After careful consideration of the motion, briefs, responses, reply, supplemental briefs, record, hearing, and applicable law, the court **denies** Defendant's Rule 59(e) Motion to Amend Judgment.

I. Background

Plaintiff Roy Dearmore ("Dearmore") filed this action pursuant to 42 U.S.C. § 1983 against Defendant City of Garland (the "City") on June 16, 2005.[1] Dearmore requested the court to enjoin the City from enforcing City Ordinance No. 5895 (the "Ordinance") which amended the City's Minimum Housing Code. Dearmore contended that he would suffer irreparable injury if the City were not enjoined. He maintained that the Ordinance violated his Fourth Amendment rights by: (1) authorizing warrantless searches of private homes; (2) failing to provide a mechanism to notify the tenant, property owner or property manager of his or her right to refuse to allow the search; and (3) requiring the applicant to disclose private information that violated his right to privacy. Dearmore further contended that the City had violated the Fourteenth Amendment.[2]

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[1] Dearmore amended his complaint on July 15, 2005, adding Marie Combs and A.C. Blair as Plaintiffs.

[2] Deamore asserted that his Fourth Amendment claim was applicable to the State via the Fourteenth Amendment. In his Original Complaint, Dearmore also asserted that the Ordinance violated the Fifth Amendment. This claim was omitted in his First Amended Complaint; therefore, it was not before the court.

On November 3, 2005, the court issued a Memorandum Opinion and Order and Preliminary Injunction enjoining the City from enforcing any provision of section 32.09 of the Ordinance that required a person who rented or leased a single-family dwelling to allow an inspection of the rental property as a condition to issuing a permit, or that penalized the lessor for refusing to allow an inspection of the property. The preliminary injunction was not to become effective until a $5,000 bond was posted by Dearmore. Dearmore did not post the bond.

On November 12, 2005, twelve days after the court issued its preliminary injunction, the City passed Ordinance No. 5957, amending section 32.09(F) and removing the requirements that a landlord consent to a warrantless inspection and that a person (landlord) who rents or leases a single-family dwelling allow an inspection of the rental property as a condition to the issuance of a permit. Immediately after the amendment to the Ordinance, the City filed a motion to dismiss the lawsuit as moot. On November 30,

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In any event, a reading of the First Amended Complaint readily reveals that the essence of this lawsuit is based on the Fourth Amendment claim; it was the big-ticket item of the lawsuit. As Dearmore received a favorable ruling on it, the court determined that costs should be taxed against the City. This is totally consistent with existing precedent. With respect to costs, Fed. R. Civ. P. 54(d)(1) provides that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d) creates a strong presumption that the prevailing party will be awarded costs. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985). No reason existed for the court not to follow this precedent.

2005, the court issued an order (1) granting the City's motion to dismiss, (2) holding that Dearmore was a "prevailing party" to the extent the court declared section 32.09(F) to be in violation of the Fourth Amendment, and (3) dissolving the preliminary injunction. On the same day, the court also issued a judgment dismissing this action, and taxed all allowable and reasonable costs against the City.

In its motion to amend the judgment, the City contends that Dearmore is not the "prevailing party" in this litigation, and that the court should therefore amend its judgment to reflect that he is not the "prevailing party" and to retax costs to the party incurring them. Dearmore disagrees and contends that he is the "prevailing party." He contends that he is a "prevailing party" because he has obtained some relief on the merits of his claim and that the injunctive relief altered the legal relationship between the parties.

II. Legal Standard for Relief under Fed. R. Civ. P. 59(e)

Under Rule 59(e), "[m]otions . . . to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (citations omitted). Such motions may not be used to relitigate issues that were resolved to the movant's dissatisfaction. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 (5th Cir. 1989). A Rule 59 motion may not be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to entry of judgment. *See*

generally 11 C. WRIGHT, A. MILLER & M. KANE § 2810.1 at 127-28 (2d ed. 1995); *see also Simon*, 891 F.2d at 1159. With respect to newly discovered evidence, a court may not grant such a motion unless the movant establishes: "(1) the facts discovered are of such a nature that they would probably change the outcome; (2) the alleged facts are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching." *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir. 2003). District courts have "considerable discretion in deciding whether to grant or deny a motion to alter a judgment." *Hale v. Townley*, 45 F.3d 914, 921 (5th Cir. 1995). In exercising this discretion, a district court must "strike the proper balance between the need for finality and the need to render just decisions on the basis of all the facts." *Id.* With this balance in mind, the Fifth Circuit has observed that Rule 59(e) "favor[s] the denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993).

III. Analysis

The City premises its argument that Dearmore is not a "prevailing party" on the Supreme Court's decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532

U.S. 598 (2001), which rejected the "catalyst theory"[3] as a permissible basis to award attorney's fees under a federal fee-shifting statute.[4] The City is the party that asserts Dearmore is seeking to establish "prevailing party" status through the "catalyst theory." Dearmore makes no such assertion. The question presented to the Court in *Buckhannon* was whether the term "prevailing party" "includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 600. For the reasons set forth herein, the court believes that the City reads *Buckhannon* much too broadly, and the "catalyst theory" is not the basis on which Dearmore would be considered a "prevailing party" under the specific facts of this case.

In *Buckhannon*, the state fire marshal issued citations to a number of residential-care facilities for allegedly violating a state law which required all residents of residential board and care homes to be capable of "self-preservation," or be capable of moving themselves from situations which presented imminent danger. These citations, or "cease-and-desist" orders, required the residential care facilities to close their

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[3] Under the "catalyst theory," "a plaintiff is a 'prevailing party' if [such plaintiff] achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601.

[4] Since Dearmore filed this action pursuant to 42 U.S.C. § 1983, the applicable fee-shifting statute to determine whether he is a "prevailing party" is 42 U.S.C. § 1988(b). *See* 42 U.S.C. § 1988(b).

facilities within 30 days of the issuance of citation. A lawsuit ensued on behalf of a number of the facilities against the State of West Virginia, two of its agencies, and eighteen individuals. Defendants agreed to stay enforcement of the cease-and-desist orders, and the parties proceeded to take discovery. The following year, the state legislature deleted the "self-preservation" requirement in the statute. After the district court dismissed the action for mootness, the residential-care facilities sought attorney's fees under the "catalyst theory." *Id.* at 600-01. The Court ultimately held that the "catalyst theory" was not "a permissible basis for the award of attorney's fees" under the two federal statutes in question. *Id.* at 610.

As the Court recognized, "a 'prevailing party' is one who has been awarded *some* relief by the court." *Id.* at 603. The City acknowledges that neither the Supreme Court nor the Fifth Circuit has addressed whether a preliminary injunction creates a sufficient material alteration of the legal relationship between the parties to allow a determination that a plaintiff qualifies as a "prevailing party." The court determines that the preliminary injunction obtained by Dearmore *in this case* satisfies the "prevailing party" standard.

The City is correct that the preliminary injunction never became effective because no bond was posted by Plaintiffs. According to the City, Dearmore failed to take the necessary steps to effectuate any changes made possible through the injunction. The City argues that the legal relationship between the parties was never materially altered because Dearmore was never entitled to enforce the injunction against the City.

This argument is fundamentally flawed, is disingenuous, and reflects "dirty pool" on the part of the City. The record amply reveals that Dearmore did not seek to post a bond on the preliminary injunction because the City's legal counsel told and convinced Dearmore's counsel that no injunction was necessary, as the City would amend the Ordinance to address the court's concerns. The City's counsel does not dispute that he made this statement or representation to Dearmore's counsel. Dearmore's counsel relied on this representation, and that the City now seeks to use it to Dearmore's detriment is simply astounding. The essence of this is that the City did not want the preliminary injunction to become effective; so its legal counsel informed Dearmore's counsel that the City would change the Ordinance to delete the constitutionally offensive provisions. Based on the representation of the City's legal counsel to Dearmore's counsel, Dearmore's action in not posting a bond was quite reasonable. Under these circumstances, rather than incur unnecessary expenses and increase litigation costs, Dearmore, through his counsel, "took the City's counsel at his word." The court can think of no reason to increase litigation costs unnecessarily, or engage in needless litigation.

Contrary to its assertions, the City did not voluntary change or amend the Ordinance; it changed the Ordinance because of the court's Memorandum Opinion and Order and Preliminary Injunction. The totality of the court's opinion and its tone apprised the parties that certain provisions of the Ordinance were clearly offensive to the United States Constitution and would not pass constitutional muster. While it is true

that the court stated, "[b]ecause the Ordinance does not allow the landlord an opportunity to refuse consent, or include a warrant procedure if consent is refused, section 32.09(F) of the Ordinance is likely to be held unconstitutional," *see* Memorandum Opinion and Order and Preliminary Injunction at 15, that language was used to conform to the standard necessary for the issuance of a preliminary injunction. The court certainly could have used much stronger language, and, in retrospect, it should have, but the court used euphemistic language in part of its ruling to "let the City down easy." If this was a mistake, the court assures the City it will not happen again. Moreover, the language to which the City refers cannot be read in a vacuum. Other parts of the court's opinion unequivocally put the City on notice that the Ordinance was constitutionally infirm. Specifically, the court stated:

> Inspections and searches of unoccupied property would clearly infringe on the property owner's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure. In these limited situations, where the property is unoccupied, the protections guaranteed by the Fourth Amendment to the United States Constitution to the property owner outweigh any interest that the government has in protecting the health, safety or welfare of the public. If it becomes necessary to inspect unoccupied properties, the City could readily, with a modicum of effort, obtain an administrative search warrant to inspect any property that may pose a danger to the public.

> The ease with which the City could acquire an administrative search warrant makes unnecessary the need for the City to require property owners to forego in advance their rights guaranteed by the Fourth Amendment. The court fully understands that the City has a valid and important governmental interest in protecting the public, however, the court sees no reason why this should be done at the expense of infringing on rights guaranteed by the Fourth Amendment to the United States Constitution.

Memorandum Opinion and Order and Preliminary Injunction at 14. The City was aware of its soon-to-be unpleasant fate, which is why it acted with dispatch to amend the Ordinance.[5] Under these circumstances, it strains credulity and requires a quantum leap of logic to assert that the City *voluntarily* changed the Ordinance.

The situation here is quite different from that which faced the parties in *Buckhannon*. In *Buckhannon*, there was no judicial determination or grant of injunctive relief, as in this case, to cause a party to modify its conduct. In *Buckhannon*, the

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[5] Twelve days is a short period of time for the council to act and pass an ordinance, considering that City officials had to discuss the proposed Ordinance among themselves, brief the Garland City Council at some point on the amended Ordinance, place it on the agenda for official council action, and post notice of the meeting and the agenda to the public at least 72 hours before the start of the meeting at which the council would take official action on the proposed Ordinance. *See* Tex. Gov't Code Ann. § 551.043 (Vernon Supp. 2005)

defendants ceased their allegedly improper conduct by agreement merely because a lawsuit had been filed, not because of judicial intervention. This court has an extremely difficult time comprehending how the City can characterize conduct as "voluntary" when a ruling makes clear that the Ordinance is constitutionally infirm and it acts immediately to address the court's concerns and rectify the constitutionally repugnant provisions. Stated another way, but for this court's ruling and granting the preliminary injunction, the City would *not have acted* to delete the offensive portions of the Ordinance. Accordingly, the necessary judicial imprimatur is present in this case for Dearmore to meet the standard for a "prevailing party." It was not present in *Buckhannon*. Moreover, as a result of the court's ruling and the City acting in direct response to that ruling, Dearmore obtained what he sought – relief from the Ordinance which violated the Constitution. There is no doubt that the relationship between Dearmore and the City has been materially altered. To say otherwise merely exalts form over substance.

The court fully recognizes that a preliminary injunction is ordinarily not a decision on the merits; but in this case, it is the functional equivalent of a ruling on the merits because of the manner and the circumstances under which the City amended the Ordinance. As previously stated, the City, as any intelligent party would, saw "the handwriting on the wall" in light of the court's opinion and injunction. There is no doubt in the court's mind that the City resorted to the use of legal legerdemain in an effort to avoid the inevitable and, in the process, convinced Dearmore that he need not take steps to make the

injunction effective by posting a bond because the City was going to amend its Ordinance to make it constitutionally sound. Rather than press the court to expedite or advance the trial on the merits, Dearmore graciously relied on the City's assurance that it would amend the Ordinance, which would moot the case. This is precisely what happened in *Palmetto Properties, Inc. v. County of Dupage*, 375 F.3d 542 (7th Cir. 2004), after the court had granted a motion for partial summary judgment.[6] The county contended that Palmetto was not a "prevailing party" because the partial summary judgment never became final or enforceable, as the case was dismissed for mootness. *Id.* at 549. The Seventh Circuit did not accept the county's argument, determined that Palmetto was a "prevailing party," and refused to reverse the district court's award of attorney's fees. *Id.* at 550. The court finds this reasoning solid and equally applicable to the facts of this case.

On occasion, the City has attempted to minimize the effect and importance of the court's ruling by referring to it as a "preliminary opinion." The court's ruling was "preliminary" only in the sense that it dealt with a preliminary injunction. The facts of this case were undisputed, and the only matters to resolve were the legal issues. The court's Memorandum Opinion and Order and Preliminary Injunction made a substantive determination regarding the unconstitutionality of certain provisions of the

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[6] That *Palmetto* involved a partial summary judgment and this case involves a preliminary injunction is really of no moment, given the special circumstances of this case.

Ordinance and left no doubt as to the resolution of the legal issues. The City knew this, which is why it pursued the course of action it did in amending the Ordinance.

Finally, the City contends that it was not given proper notice before the court granted the preliminary injunction and that the propriety of the preliminary injunction was "legally problematic." Specifically, the City contends that it was not given an opportunity "to fully present its views on the merits of the legal issues addressed by the Court's Preliminary Injunction." City of Garland's Rule 59(e) Motion to Amend Judgment at 6.

The court does not understand the basis for this argument. The City, as reflected in its motion to amend judgment, knew that Dearmore sought to enjoin enforcement of the Ordinance in question. Moreover, as the City correctly points out, after the court initially denied Plaintiff's Request for Temporary Restraining Order, Dearmore filed an amended motion for a temporary restraining order and requested the court to reconsider its earlier denial of the temporary restraining order, or hold an expedited preliminary injunction hearing. As the City acknowledges, the court held a hearing on Dearmore's request on July 6, 2005. The City, of course, received notice that the hearing would take place and attended the hearing. The City had a chance to present its views. The court questioned both sides with respect to the constitutionality of the Ordinance at the hearing and allowed the parties ample time to address the motion

to dismiss, as the request for injunctive relief and the motion to dismiss necessarily had overlapping issues.[7]

The City relies on *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996), to support its lack of notice argument. This reliance, however, is misplaced. In *Kaepa*, the court stated:

> Rule 65(a)(1) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." We have interpreted the notice requirement of Rule 65(a)(2) to mean that "where factual disputes are presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted." If no factual dispute is involved, however, no oral hearing is required; under such circumstances the parties need only be given "ample opportunity to present their respective views of the legal issues involved."

Id. at 628 (footnote and citations omitted). In this case, the material facts were not in dispute. The issues to be decided were strictly legal in nature. Had it been clear to the court initially that there were no disputed facts, it would have not held a hearing, and would have decided the matter strictly on the written

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[7] Frankly, the court was disappointed by the dearth of briefing by the parties on the Fourth Amendment issue. The court essentially did its own research regarding the constitutionality of the Ordinance.

submissions of the parties. Since the parties did not present differing versions of the facts, no oral hearing was even necessary. As the record reflects, both sides had ample opportunity to submit their respective views of the legal issues involved, whether on the request for injunctive relief or the motion to dismiss.

Further, the court determines that the City has forfeited its right to raise any issues – procedurally or substantively – regarding the propriety of the preliminary injunction. When the preliminary injunction was granted, the City could have requested the court to reconsider its ruling, appealed to the Fifth Circuit pursuant to 28 U.S.C. § 1292(a)(1) and Fed. R. App. P. 4(a), or continued to challenge the injunctive relief at the district court level and appeal the final judgment. The City did none of these, and it is too late to do so at this juncture. Rather than raising questions related to the legality of the preliminary injunction, the City discouraged Dearmore's counsel from posting a bond and sought an immediate amendment to the Ordinance to remove the constitutionally repugnant language. The City accepted the court's ruling regarding the preliminary injunction, and did not exercise other options which could easily have addressed and preserved any substantive or procedural challenges it desired to make regarding the preliminary injunction. For these reasons, the court concludes that the City has forfeited any right to challenge the issuance of the preliminary injunction.[8]

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[8] Although courts often use "forfeiture" and "waiver" interchangeably, the court believes "forfeiture," rather than

IV. Mootness

On May 24, 2006, the court issued an order and directed the parties to submit supplemental briefing on the issue of mootness. The court ordered the supplemental briefing because of remarks made by the City's counsel at one of the hearings. In discussing that the legal relationship between the parties had not been materially altered, the City's counsel stated that the City could, if it chose, re-enact the Ordinance made the basis of this lawsuit. This statement by counsel caused the court some concern because it was not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). The question in the court's mind was whether, in light of the statement, this case was really moot. The court, because of the decision it has reached regarding "prevailing party," finds it unnecessary to revisit the issue of mootness.

V. Conclusion

If this were a "catalyst theory" case as the City contends, the court agrees that *Buckhannon* controls. The court, however, for the reasons previously stated, believes that this case *is not* a "catalyst theory" case,

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"waiver," is the appropriate term to describe the City's actions. "Forfeiture" is the "failure to make timely assertion of a right," and "waiver" is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted); *Douglas v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996).

and therefore *Buckhannon* has limited use and application. If the City's conduct in amending the Ordinance can be termed "voluntary," both *Black's Law Dictionary* (8th ed.) and *Merriam-Webster's Collegiate Dictionary* (11th ed.) need to update their respective dictionaries to add a new definition for the meaning of "voluntary." If the City is going to prevail on its argument, it will have to do so at the appellate level, because its approach, as far as this court is concerned, deprives section 1988(b) of all vitality in cases with the same or substantially similar facts as those present in this case.

This court simply does not accept the legal theory that a preliminary injunction can never give rise to "prevailing party" status. The City appears to embrace this theory. Under this approach, no matter how unconstitutionally egregious the enjoined violation or conduct, a governmental entity can readily escape liability, costs, and attorney's fees by simply amending an ordinance to remove the constitutionally offensive provisions and thereby moot the action. This is precisely what we have in this case. The court has seen nothing to indicate that Congress intended such a scheme when it enacted 42 U.S.C. § 1988(b), or that Congress intended for courts to discard common sense and fairness to reach absurd legal results.

For the reasons stated herein, the court determines that Dearmore has obtained the necessary relief to establish that he is a "prevailing party." The City has failed to meet the necessary standard to justify an amendment of the court's judgment or order issued on November 30, 2005. Accordingly, the court **denies** Defendant's Rule 59(e) Motion to Amend Judgment.

The only pending motion is that for attorney's fees filed by Dearmore. As stated previously, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The parties, through counsel, are **ordered** to confer and make every reasonable effort to resolve the matter of attorney's fees without court intervention. From what the court can ascertain from previous communications between the parties, the amount of attorney's fees is small, and there had been some stipulation regarding attorney's fees. This matter needs to be resolved.[9] The parties are therefore **directed** to inform the court in writing by **September 7, 2006** whether they are able to resolve the attorney's fees issue. If not, the court will proceed to issue a separate order pursuant to Fed. R. Civ. P. 58 on the issue of attorney's fees.

It is so ordered this 29th day of August, 2006.

/s/
Sam A. Lindsay
United States District Judge

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[9] If the City wishes to appeal the merits of the court's ruling, the parties can still stipulate to the amount of attorney's fees and make their stipulation subject to what happens on appeal.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed November 30, 2005]

ROY DEARMORE, individually and as Representative of all owners of Single Family residential property in Garland Texas, MARIE COMBS, individually and as Representative of all tenants of Single Family residential property in Garland, Texas, and A. C. BLAIR, individually and as Representative of all property managers in Garland, Texas,

Plaintiffs,

v.

CITY OF GARLAND,

Defendant.

ORDER

Before the court is the City of Garland's Motion to Dismiss as Moot, filed November 16, 2005. After careful consideration of the motion and the record in this case, the court **grants** the City of Garland's Motion to Dismiss as Moot. On November 3, 2005, the court in its Memorandum Opinion and Order granted Plaintiff Roy Dearmore's request for a preliminary injunction as to Garland, Tex., Code of Ordinances ch. 32, § 32.09(F). That section of the Ordinance required a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, and criminally penalized a lessor for refusing to allow an inspection.

On November 15, 2005, the City of Garland amended Section 32.09(F), removing the requirements that a landlord consent to a warrantless inspection and that a person who rents or leases a single-family dwelling allow an inspection of the rental property as a condition of issuing a permit. On November 21, 2005, the court's law clerk conferred with counsel for the parties, and the parties agreed that the only outstanding issue is that of attorney's fees. The court determines that Plaintiff Roy Dearmore is a prevailing party to the extent that the court declared Section 32.09(F) of the Ordinance to be in violation of the Fourth Amendment to the United States Constitution. Dearmore is therefore entitled to reasonable attorney's fees on this claim. Any request for attorney's fees shall be filed in accordance with Fed. R. Civ. P. 54(d)(2). The court also determines that the matter of attorney's fees can be addressed postjudgment pursuant to Fed. R. Civ. P. 54(d)(2). Regarding attorney's fees, the Supreme Court has strongly admonished that "[a] request for attorney's fees should not result in a second

major litigation." *Hensley v. Eckerhart*, 461 US. 424, 437 (1983). Accordingly, the parties **shall** confer and make every reasonable effort to resolve the matter of attorney's fees without court intervention.

In light of the court's Memorandum Opinion and Order of November 3, 2005, the city's subsequent action in amending and removing the enjoined section of the Ordinance, and the parties' agreement regarding matters remaining for adjudication, the court **grants** the City of Garland's Motion to Dismiss as Moot, **dissolves** the preliminary injunction issued on November 3, 2005,* and **dismisses this action with prejudice.** The court will issue judgment by separate document as required by Fed. R. Civ. P. 58. Any application for attorney's fees must be filed postjudgment in accordance with Fed. R. Civ. P. 54(d)(2). The response and reply shall be filed in accordance with the local civil rules of ths district.

It is so ordered this 30th day of November, 2005.

/s/
Sam A. Lindsay
United States District Judge

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* While the court dissolves the preliminary injunction, Plaintiffs shall have the right to seek judicial relief if the removed provision of the Ordinance is reinstated, or a similar provision is adopted by the City. Further, although the court issued a preliminary injunction, it never became effective because Plaintiff Dearmore never posted a bond as required by the court.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed November 30, 2005]

ROY DEARMORE, individually and as Representative of all owners of Single Family residential property in Garland Texas, MARIE COMBS, individually and as Representative of all tenants of Single Family residential property in Garland, Texas, and A. C. BLAIR, individually and as Representative of all property managers in Garland, Texas,	)
Plaintiffs,	)
v.	)
CITY OF GARLAND,	)
Defendant.	)

JUDGMENT

This judgment is issued pursuant to the court's Memorandum Opinion and Order of November 3, 2005; and the court's order of November 30, 2005. By its opinion and order of November 3, 2005, the court granted Plaintiff Roy Dearmore's request for a preliminary injunction as to Garland, Tex., Code of

Ordinances ch. 32, § 32.09(F). That provision required a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit; and criminally penalized a lessor for refusing to allow an inspection. As a result of the court's opinion and order, the City of Garland amended its Ordinance and removed the offensive provision, thereby mooting the case or controversy and rendering the injunction unnecessary. The court dissolved the injunction because of the City of Garland's corrective action.[1] In light of the Memorandum Opinion and Order, the action taken by the City of Garland, and the court's subsequent order of November 30, 2005, no case or controversy exists between the parties.

It is therefore ORDERED, ADJUDGED, and DECREED that this action is **dismissed with prejudice**;[2] that all relief not expressly granted herein is denied, except for any claim regarding attorney's fees; and that all allowable and reasonable costs are taxed against the City of Garland.

Signed this 30th day of November, 2005.

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[1] The injunction never became effective because Plaintiff Dearmore never posted bond as ordered by the court.

[2] Although the court dismisses this action with prejudice, nothing herein shall preclude Plaintiffs from seeking judicial review if the City of Garland seeks to reinstate the section of the Ordinance that the court declared unconstitutional, or implements an ordinance of similar import to that declared unconstitutional by the court.

/s/
Sam A. Lindsay
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed November 3, 2005]

ROY DEARMORE, individually and as Representative of all owners of Single Family residential property in Garland Texas, MARIE COMBS, individually and as Representative of all tenants of Single Family residential property in Garland, Texas, and A. C. BLAIR, individually and as Representative of all property managers in Garland, Texas,

Plaintiffs,

v.

CITY OF GARLAND,

Defendant.

MEMORANDUM OPINION AND ORDER AND PRELIMINARY INJUNCTION

Before the court is Plaintiff Roy Dearmore's Amended Motion for Temporary Restraining Order and Motion to Reconsider Court's Denial of Temporary Restraining Order, filed July 1, 2005;[1] and Defendant City of Garland's Motion to Dismiss for Want of Subject Matter Jurisdiction (12(b)(1)) and for Failure to State a Claim (12(b)(6)), filed July 6, 2005. After careful consideration of the request for injunction, the testimony given at the preliminary injunction hearing, argument of counsel, the motions and briefs, response, reply and applicable law, the court **grants in part** Plaintiff's request for a preliminary injunction; **denies as moot** Plaintiff's Amended Motion for Temporary Restraining Order and Motion to Reconsider Court's Denial of Temporary Restraining Order; **denies as moot** City of Garland's Motion to Dismiss for Want of Subject Matter Jurisdiction (12(b)(1)); and **grants in part and denies in part** City of Garland's Motion to Dismiss for Failure to State a Claim (12(b)(6)).

I. Factual and Procedural Background

Plaintiff Roy Dearmore ("Dearmore" or "Plaintiff") filed this action pursuant to 42 U.S.C. § 1983 against Defendant City of Garland (the "City" or "Defendant")

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[1] In his motion, Plaintiff requests a temporary restraining order and also a hearing on a preliminary injunction. In his First Amended Complaint, Plaintiff requests a preliminary injunction against enforcement of the ordinance until a final hearing on the merits of the case. The court therefore treats Plaintiff's motion as a motion for preliminary injunction.

on June 16, 2005.[2] Dearmore requests the court to enjoin the City from enforcing City Ordinance No. 5895 (the "Ordinance") which amends the City's Minimum Housing Code. Dearmore contends that he will suffer irreparable injury if the City is not enjoined. He maintains that the Ordinance violates his Fourth Amendment right by: (1) authorizing warrantless searches of private homes; (2) failing to provide a mechanism to notify the tenant, property owner or property manager of his or her right to refuse to allow the search; and (3) requiring the applicant to disclose private information that violates the right to privacy. Dearmore further contends that the City has violated the Fourteenth Amendment.[3]

Dearmore owns four properties in the City that he rents to various tenants. The City adopted the Ordinance on April 19, 2005. The Ordinance provides two separate and distinct criteria for the permitting of rental property in the City. Section 32.07 provides the criteria for obtaining a Multifamily License – necessary to lease "three or more residential dwelling units to another person or persons which are part of a multifamily dwelling." Garland, Tex., Code of Ordinances ch. 32, § 32.07 (2005). Section 32.09 provides the criteria for obtaining a Single Family

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[2] Dearmore amended his complaint on July 15, 2005, adding Marie Combs and A.C. Blair as Plaintiffs.

[3] Deamore asserts that his Fourth Amendment claim is applicable to the State via the Fourteenth Amendment. In his Original Complaint, Dearmore also asserted that the Ordinance violated the Fifth Amendment. This claim is omitted in his First Amended Complaint; therefore, it is not before the court.

Permit – necessary to rent or lease "a single-family residential dwelling." *Id.* § 32.09 (2005).

To obtain a Single Family Permit, the Ordinance requires a person or entity that owns one or more rent houses to: (1) submit an application to operate each rental property; (2) pay the appropriate fee ($65); and (3) post and display the permit in a visible location inside the rental property. *Id.* § 32.09(B)(D). The application and permit fee are to be paid no later than 60 days from the effective date of the Ordinance. *Id.* § 32.09(C). The application is to include the name, address, telephone number and driver's license number of the owner, tenant and property manager. *Id.* § 32.09(B)(1)(a)(c). As a condition of the permit, the City will inspect the property a least once a year. Failure of an owner, who is not a resident at the property, to allow an inspection is an offense. *Id.* § 32.09(F)(1)(3). When consent to inspect has been refused or cannot be obtained, the City is authorized to obtain a search warrant to conduct an inspection. *Id.* § 32.09(F)(4). This section also provides that:

> [N]o search warrant shall be obtained without probable cause to believe that a fire or health hazard or violation or unsafe building condition is present on the premises sought to be inspected. A search warrant is not authorized based solely upon the failure of an owner to obtain a permit under this section.

Id.

Dearmore received a letter from the Garland Health Department Code Compliance Division, dated

June 10, 2005, advising him of the adoption of the Ordinance and its permit and inspection requirements. The letter stated that owners of rent houses are required to "allow the Health Department access to the exterior and interior of the home for the purposes of determining compliance with all applicable sections of the Code." Affidavit of Roy Dearmore, Exhibit A. The letter also stated that "[a]s a rule, owners will be given a three to seven day notice of the initial inspection to facilitate scheduling the inspection." *Id.* The letter further stated that "[t]he compliance deadline for submitting a complete application and paying the permit fee is July 11, 2005. Failure to comply with the permit application deadline will result in the issuance of Class C misdemeanor citations carrying fines [] from $100 to $2000 per day."[4] *Id.*

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[4] Section 2 of the Ordinance provides that "[A] violation of any provision of this Ordinance shall be a misdemeanor punishable in accordance with Sec. 10.05 of the Code of Ordinances of the City of Garland, Texas." Section 10.05 of the Code of Ordinances provides:

> Whenever in this [C]ode or in any ordinance of the City an act is prohibited, or is made or declared to be unlawful, or an offense or a misdemeanor, or wherever in such Code or ordinance the doing of any act is required, or the failure to do any act is declared to be unlawful, the violation of any such provision of this Code or any such ordinance shall be punished by a fine of not exceeding two thousand dollars ($2,000.00). . . . Each day or portion of a day any violation of this code or any ordinance shall continue or occur shall constitute a separate offense.

Garland, Tex., Code of Ordinances ch. 10, § 10.05 (2005).

Dearmore filed his Original Complaint and Request for Temporary Preliminary and Permanent Injunctive Relief on June 16, 2005. He also filed a Motion for Temporary Restraining Order. The court denied without prejudice Dearmore's Motion for Temporary Restraining Order. The court determined that Dearmore failed to meet all the prerequisites for a temporary restraining order. On July 1, 2005, Dearmore filed his Amended Motion for Temporary Restraining Order and Motion to Reconsider Court's Denial of Temporary Restraining Order or in the Alternative Request for Expedited Preliminary Injunction Hearing.

The City filed its motion to dismiss on July 6, 2005. The City contends that Dearmore has failed to allege sufficient facts to establish the court's subject matter jurisdiction over his Fifth Amendment claims;[5] failed to allege sufficient facts to state a claim upon which relief may be granted as to his substantive due process claim under the Fourteenth Amendment; and failed to establish that he has standing to assert his Fourth

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[5] The City contends that Dearmore has failed to plead sufficient facts to establish this court's subject matter jurisdiction over his Fifth Amendment claims that his property has been taken without just compensation and that the Ordinance violates his due process rights. Dearmore amended his complaint on July 15, 2005, after the City filed its motion to dismiss. *See* First Amended Original Complaint, Docket No. 20. The amended complaint does not include a Fifth Amendment claim, and this claim is no longer before the court. As the basis for the City's motion to dismiss for want of subject matter jurisdiction is Deamore's Fifth Amendment claim, the City of Garland's Motion to Dismiss for Want of Subject Matter Jurisdiction (12(b)(1))is **denied as moot**.

Amendment claim. A preliminary injunction hearing was held on July 7, 2005. The court now considers the request for injunctive relief and the motion to dismiss.

II. Applicable Standards of Law

A. Preliminary Injunction

There are four prerequisites for the extraordinary relief of a temporary restraining order or preliminary injunction. To prevail, Plaintiff must demonstrate: (i) a substantial likelihood of success on the merits; (ii) a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law; (iii) that greater injury will result from denying the temporary restraining order than from its being granted; and (iv) that a temporary restraining order will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Canal Auth. of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (*en banc*). The party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted. *Mississippi Power and Light Co. v. United Gas Pipeline*, 760 F.2d 618, 621 (5th Cir. 1985); *Clark*, 812 F.2d at 993. Otherwise stated, if a party fails to meet *any* of the four requirements, the court cannot grant the temporary restraining order or preliminary injunction.

B. Rule 12(b)(6) Failure to State a Claim

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M Univ.*

Sys., 117 F.3d 242, 247 (5th Cir. 1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Stated another way, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.*; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Likewise, "'[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims.'" *Id.* (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, not mere conclusory

allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

III. Analysis

A. Introduction

Dearmore contends that the Ordinance violates the Fourth Amendment by: (1) authorizing warrantless searches of private homes; (2) failing to advise the tenant or owner that he does not have to consent to a search; and (3) requiring private information in the application process. *See* First Amended Original Complaint at 6-7. The City maintains that Dearmore's Fourth Amendment claims fail because he has failed to allege sufficient facts to state a claim upon which relief may be granted. Specifically, the City contends that Dearmore: (1) has no standing to challenge the Ordinance under the Fourth Amendment; (2) makes a facial challenge to the Ordinance and the Ordinance is facially valid; and (3) has failed to assert any facts to demonstrate that he has a subjective expectation of privacy in the property that he leases to third parties.

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

B. Standing

A party has standing if: (1) he has suffered a "concrete and particularized" injury that is actual or imminent rather than conjectural or hypothetical; (2) there is a causal relationship between the injury and the challenged conduct; and (3) it is likely and not merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Westfall v. Miller*, 77 F.3d 868, 871 (5th Cir. 1996). The City contends that Dearmore does not have standing because he, as a non-resident landlord, does not have a reasonable expectation of privacy in residential property leased to a tenant, and he is not required to give consent for the tenant. The court agrees that the property owner has no expectation of privacy if the property is leased. *See United States v. Dyar*, 574 F.3d 1385, 1390 (5th Cir. 1978), *cert. denied,* 439 U.S. 982, 99 (1978) (an owner of a leasehold interest in an aircraft had no expectation of privacy, and therefore lacked standing, when possession of the aircraft was given to another). If, however, the rental property is not occupied, the only logical person who would have standing and an expectation of privacy would be the owner of the property. The property owner therefore has not relinquished his standing or expectation of privacy in situations where the property is not occupied.

Moreover, a property owner's rental property is commercial property. Indeed, it would be fatuous to argue otherwise, as rental property is property which is put in the stream of commerce for economic purposes. The Supreme Court has recognized that the Fourth Amendment's prohibition of unreasonable search and seizures is applicable to commercial premises as well as private residences. *See New York v. Burger*, 482 U.S. 691, 699 (1987). As the court stated in *Burger*:

> An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes.

Id. (internal citations omitted). Although Dearmore does not reside at his rental properties, the court views his ownership interest in his rental property as that of the owner of a commercial business, as it is used for commercial purposes. As such, he has a reasonable expectation of privacy in his rental property. *See v. City of Seattle*, 387 U.S. 541, 543 (1967). In that case, the Court stated:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in

> jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id.

The Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978). "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Id.*

Under the terms of the Ordinance, in order to rent his property, an owner must obtain a permit. If a permit is not obtained, the owner cannot make commercial use of rental property without incurring a substantial penalty. When the owner applies for a permit, he must agree to abide by the Ordinance. The Ordinance requires that the owner consent to an annual inspection of his rental property whether it is occupied or not, as long as he is not the occupant. It is an offense if an owner rents his property without a permit. It is also an offense if an owner refuses to allow an inspection by the City. An owner, therefore, can be fined up to $2000 per day for renting his property without a permit. He may also be fined up to $2000 per day for refusing to allow an inspection of his rental property. Dearmore thus has a concrete injury that is actual or imminent – involuntary consent in order to receive a permit or risk being cited for a

separate offense for each day he is not in compliance. Although the City has not cited Dearmore for an offense, it could do so at any time, which makes the injury imminent rather than conjectural or hypothetical. Dearmore must consent in advance to the annual inspection, even if the property is unoccupied. There is a causal relationship between Dearmore's injury and the enforcement of the Ordinance; and the injury is likely to be redressed by a favorable decision in this action. Dearmore therefore has standing to bring this action challenging the constitutionality of the Ordinance with respect to the provisions that require him to consent to the inspection in order to receive a permit or be cited for an offense. *See generally Lujan*, 504 U.S. at 560-61. As the court determines that Dearmore has standing, it now addresses the City's argument that Dearmore has failed to state a valid claim upon which relief can be granted.

C. Warrantless Administrative Searches

Dearmore contends that the Ordinance's requirement that he consent to a warrantless inspection of his property in order to obtain a rental permit violates the Fourth Amendment. The City counters that the only person required to consent to an inspection is a non-resident owner, and such owner has no Fourth Amendment protection in non-owner occupied rental premises because he has no reasonable expectation of privacy. The City maintains that the tenant can still refuse the warrantless search. The City is correct insofar as its arguments goes; however, the City's argument falls short in that the Ordinance

provides no safeguards or protections in those situations when the rental property is unoccupied. The Ordinance simply does not take into account such situations. If the property is unoccupied, the only logical person to have standing is the owner or someone authorized to act on behalf of the owner regarding the property in question.

The leading case on the issue of warrantless administrative searches is *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967). *Camara* involved a tenant who refused to consent to an inspection of his property by municipal housing officials. The tenant was arrested for refusing to allow a lawful inspection. *Id.* at 526. The tenant argued that the section of the housing code that authorized municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the housing code existed was a violation of the Fourth and Fourteenth Amendment. *Id.* at 527. The Supreme Court agreed and held that warrantless searches of residential property by municipal inspectors violated the Fourth Amendment protection against unreasonable searches and seizures. *Id.* at 528. The Court reasoned that "administrative searches of the kind at issue here are significant intrusions upon the interest protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual[.]" *Id.* at 534. The Court acknowledged the strong governmental interest in inspecting for housing code violations and established standards for obtaining administrative search warrants to inspect for such

violations. *Id.* at 538-40. The Court concluded that probable cause to issue an administrative warrant exists if reasonable legislative or administrative standards for conducting the inspection are satisfied with respect to a particular dwelling. *Id.* Factors to be considered include the passage of time, the nature of the building, or the condition of the entire area. *Id.* The Court, however, went on to conclude that reasonableness is the ultimate standard. *Id.*

The City maintains that *Camara* is inapplicable here because *Camara* involved the tenant's refusal to allow a warrantless inspection of his residence, and that its Ordinance only requires that non-resident owners consent to an inspection. The parties do not cite any Fifth Circuit authority on the issue of warrantless administrative searches of residences used for commercial purposes, and the court was unable to find any.[6] Although no Fifth Circuit

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[6] The City cites cases from the Sixth and Ninth Circuits to support its contention that non-resident landlords do not have a reasonable expectation of privacy in residential areas they have leased to others. *See United States v. Shamaeizadeh*, 80 F.3d 1131, 1139 (6th Cir. 1996); *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 544 (6th Cir. 2003), *cert denied*, 541 U.S. 1041(2004); *Bonds v. Cox*, 20 F.3d 697, 701 (6th Cir. 1994); *LPI Downtown Investors 1 v. Hahn*, 139 F.3d 906 (9th Cir.), *cert. denied*, 525 U.S. 1002 (1998). Dearmore offers authority from New York, Indiana, Ohio, California and Illinois for his position that requiring a property owner to consent to a warrantless inspection of his property in order to obtain a rental permit is a violation of the Fourth Amendment. *See Sokolov v. Freeport*, 52 N.Y.2d 341, 420 N.E.2d 55 (1981); *Currier v. City of Pasadena*, 48 Cal. App. 3d 810, 121 Ca. Rptr. 913 (1975); *Wilson v. City of Cincinnati*, 346 N.E. 2d 666

authority directly on point was located, the court believes the parties could have been more direct and forceful in presenting their respective cases and providing the court with the necessary research. Such failure unnecessarily caused the court to expend scarce judicial resources.

Upon reviewing *Camara*, the parties' authorities and arguments, and conducting its independent research, the court disagrees with the City that *Camara* is inapplicable here. *Camara* makes no distinction between owner and tenant, but rather holds that an administrative search of a private residence, including a private residence owned by one person and rented by another, must include a warrant procedure. In this case the City ignores that the permitting process does not allow the owner to refuse consent when the property is unoccupied without being subject to criminal penalties, which can be quite substantial. *The court finds the City's reasoning unpersuasive because the property owner is being penalized for his failure to consent in advance to a warrantless search of unoccupied property. The property owner's consent thus is not voluntary at all.* A valid consent involves a waiver of constitutional rights and must be voluntary and uncoerced. *See United States v. Santiago*, 410 F.3d 193, 198-99 (5th Cir. 2005); *United States v. Olivier-Becerril*, 861 F.2d 424, 425 (5th Cir.1988). The alternatives presented to the property owner are to consent in advance to a warrantless

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(Ohio 1976); *City of Vincennes v. Emmons*, 817 N.E.2d 291 (Ct. App. – Indiana 2005); *Brower v. Bolingbrook*, 735 F.Supp. 768 (N.D. Ill 1990).

inspection, or to face criminal penalties; thus consent is involuntary. On the other hand, if the owner does not consent to the warrantless search, he does not receive a permit. The whole purpose of receiving a permit is to rent the property for commercial purposes. Without a permit, the owner cannot engage in lawful commercial activity. The owner is thus faced with equally unavailing situations.

While the City has shown a strong governmental need or interest to make such a requirement in most instances to protect the public health, safety and welfare, the court believes the Ordinance goes too far with respect to those situations in which the rental property is not occupied by a tenant. By way of example, the court provides the following illustration:

> A property owner obtains a permit and leases his property to a tenant beginning January 6, 2006. The City inspects the property in March 2006. The tenant moves out in November and the property is vacant. The following January, the owner obtains a new permit with the intent to lease to a new tenant. The City seeks to conduct its annual inspection in March 2007, although the property is still vacant.

Under the regulatory scheme established under the Ordinance, the property owner must consent in advance to the inspection, no matter how unreasonable the search or inspection.

Another illustration also identifies the overbreadth of the City's Ordinance. Consider the following situation:

> A property owner obtains a permit on January 6, 2006. The tenant moves in on February 1, 2006, and moves out in May 2006. The City did not inspect the property prior to the tenant vacating the premises. The City decides to inspect the property in June 2006, and the owner cannot refuse to consent to the inspection of the vacant property, regardless of the necessity or reasonableness of the inspection.

With respect to either hypothetical, the City's argument is that the owner has no expectation of privacy and cannot refuse the inspection. "This dog will not hunt," and the argument is clearly contrary to the Supreme Court's holding in *New York v. Burger*, 482 U.S. at 699, in which it states that an owner or operator of a business has an expectation of privacy in commercial property. Inspections and searches of unoccupied property would clearly infringe on the property owner's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure. In these limited situations, where the property is unoccupied, the protections guaranteed by the Fourth Amendment to the United States Constitution to the property owner outweigh any interest that the government has in protecting the health, safety or welfare of the public. If it becomes necessary to inspect unoccupied properties, the City could readily, with a modicum of effort, obtain an administrative search warrant to inspect any property that may pose a danger to the public. The ease with which the City could acquire an administrative search warrant makes unnecessary the need for the City to require property owners to forego in advance their rights guaranteed by the Fourth

Amendment. The court fully understands that the City has a valid and important governmental interest in protecting the public, however, the court sees no reason why this should be done at the expense of infringing on rights guaranteed by the Fourth Amendment to the United States Constitution.

In the limited circumstances previously set forth, the court does not believe that a property owner's lot is so hapless that it places him or her between Scylla and Charybdis.[7] Here the equally repugnant choices, or the "between a rock and a hard place" dilemma, for the owner of rental property are: (1) the denial of a permit for refusing to consent to the inspection and thus loss of the ability to make commercial use of one's property for economic gain; (2) the withdrawal of

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[7] According to Greek mythology, Scylla was originally a beautiful nymph who was later turned into a monster by Circe, an enchantress. Glaucus, a sea god, fell in love with Scylla; however, she wanted no part of him. When Scylla rebuffed Glaucus's efforts to spark her, he enlisted the aid of Circe to persuade Scylla that she should love him. Circe, however, had ideas of her own and tried to convince Glaucus to love her instead of Scylla. When Glaucus spurned Circe's amorous efforts, she became enraged and turned Scylla into a monster to spite Glaucus.

After being turned into a monster, Scylla lived in a cave overlooking the Strait of Messina, which separates the island of Sicily from Italy. Immediately opposite the cave where Scylla lived was the whirlpool Charybdis. When mariners navigated the Strait of Messina, they were faced with equally repugnant alternatives of either (1) being devoured by Scylla, or (2) being sucked into and drowned by the deadly waters of the whirlpool Charybdis, which is the proverbial "between a rock and a hard place" dilemma.

consent, which will result in the imposition of substantial monetary fines for refusing to allow the inspection; or (3) consent in advance to the warrantless search or inspection, regardless of the necessity of such an inspection or search.

The court determines that in order to comply with the requirements of *Camara* and the protections of the Fourth Amendment, the Ordinance must give the landlord the opportunity to refuse to consent if the property is unoccupied and include a warrant procedure to be followed in the event the landlord refuses. Because the Ordinance does not allow the landlord an opportunity to refuse consent, or include a warrant procedure if consent is refused, section 32.09(F) of the Ordinance is likely to be held unconstitutional. To hold otherwise would give the City carte blanche authority to conduct searches and inspections with impunity or without any type of safeguards on property in which the owner clearly has an expectation of privacy.[8]

For the reasons stated herein, accepting all well-pleaded facts in the complaint as true and viewing them in the light most favorable to Dearmore, the court cannot say that it appears beyond doubt that Dearmore can prove no set of facts in support of his

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[8] Dearmore has established that no set of circumstances exist under which section 32.09(F) of the Ordinance would be valid with respect to warrantless administrative searches of unoccupied property. Accordingly, Dearmore has mounted a successful facial challenge to this provision of the Ordinance. *See United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004).

claim which would entitle him to relief. Dearmore thus states a valid cause of action against the City, and the City's motion to dismiss as to Plaintiff's Fourth Amendment claim should be denied.

D. Right to Privacy

Dearmore contends that the Ordinance's requirement that the applicant disclose his name, address and driver's license number and those of the tenant in a public document violates his right to privacy. Dearmore offers no authority in support of this contention. The City maintains that even if Dearmore has a constitutional right to privacy that would protect his driver's license number, the number is protected from disclosure under Texas law. The court agrees.

Pursuant to Tex. Government Code § 552.130(a), the following information is excepted from public disclosure:

> (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
> (2) a motor vehicle title or registration issued by an agency of this state; or
> (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Id. In *Whalen v. Roe*, 429 U.S. 589, 599-606 (1977), the Supreme Court stated that privacy interests are adequately protected if there are statutes that provide safeguards against disclosure of personal information collected by the government. As there is a statute that

adequately safeguards Dearmore and his tenant's driver's license numbers, and Dearmore has not alleged that this or any other private information has been disclosed by the City, he can prove no set of facts in support of his violation of right to privacy claim which would entitle him to relief. Accordingly, the City's motion to dismiss as to this claim should be granted.

IV. Conclusion

For the reasons stated herein, the court **denies as moot** Defendant City of Garland's Motion to Dismiss for Want of Subject Matter Jurisdiction (12(b)(1)); **denies** Defendant City of Garland's Motion to Dismiss for Failure to State a Claim (12(b)(6)) as to Plaintiff Roy Dearmore's claim that City of Garland Ordinance No 5895 is unconstitutional because it provides for warrantless searches of private homes and commercial property; and **grants** Defendant City of Garland's Motion to Dismiss for Failure to State a Claim (12(b)(6)) as to Plaintiff Roy Dearmore's claim that the Ordinance violates his constitutional right to privacy by requiring that he disclose his name, address and driver's license number and those of the tenant in the application, and this claim is **dismissed with prejudice** for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

V. Preliminary Injunction

For the reasons stated in Section III (B)and (C), which are incorporated in this section by reference as if repeated verbatim, the court determines that

Dearmore has demonstrated a substantial likelihood of success on the merits as to his claim that the Ordinance will violate the Fourth Amendment's protection from unreasonable searches by requiring that the owner of rental property consent in advance to an annual inspection in order to receive a permit, and citing an owner for an offense if he refuses to consent. Dearmore has also demonstrated a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law, because in order to receive a permit he must agree to abide by all the provisions of the Ordinance, which includes agreeing in advance to a warrantless inspection. Dearmore also is subject to being fined, or even arrested, for a misdemeanor violation. Each day for which he is not in compliance or violates the Ordinance constitutes a separate offense. Dearmore has further demonstrated that granting a preliminary injunction will subject the City to minimal harm, if any, while protecting him from irreparable harm which could not otherwise be adequately remedied at law. The City, with minimal effort, may amend its ordinance to include the owner's right of refusal of an inspection and include a warrant requirement upon that refusal. The court determines that the effect, if any, on the City's regulatory scheme would be negligible. Finally, Dearmore has demonstrated that a preliminary injunction will not disserve the public interest, as enjoining the enforcement of an unconstitutional provision of the Ordinance promotes rather than disserves the public interest. Enjoining such enforcement ensures that private citizens will not be subject to unconstitutional actions by the City. Moreover, constitutional violations should be enjoined

as soon as practicable; otherwise, the Constitution is of little value.

Accordingly, the court **grants** Plaintiff Roy Dearmore's request for a preliminary injunction as to section 32.09(F) of the Ordinance that requires a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, and that criminally penalizes a lessor for refusing to allow an inspection; and **denies as moot** Plaintiff Roy Dearmore's Amended Motion for Temporary Restraining Order and Motion to Reconsider Court's Denial of Temporary Restraining Order.

As Dearmore has established the four prerequisites for a preliminary injunction, the court hereby **enjoins** the City from **enforcing** any provision of section 32.09 of the Ordinance that requires a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, or penalizes the lessor for refusing to allow an inspection. This preliminary injunction does not affect the remainder of the Ordinance, as the court determines that the Ordinance, without the offensive provisions, can function independently. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987).

The court hereby **sets a bond** in the amount of **$5,000**, and this preliminary injunction shall not become effective until Plaintiff Roy Dearmore tenders to the clerk of the court the sum of **$5,000** cash, or a bond for **$5,000** in a form approved by the clerk of the court, in compliance with Fed. R. Civ. P. 65(c).

This preliminary injunction **shall remain in effect** until a trial is conducted on the merits, or until it is otherwise modified by the court. This injunction is **issued** at 1:40 p.m. on November 3rd, 2005.

It is so ordered this 3rd day of November, 2005.

/s/
Sam A. Lindsay
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:05-CV-1231-L

[Filed June 28, 2005]

ROY DEARMORE, individually and as Representative of all owners of single Family residential property in Garland Texas, Plaintiff,	)
v.	)
CITY OF GARLAND, Defendant.	)

MEMORANDUM OPINION AND ORDER

Before the court is Plaintiff's Motion for Temporary Restraining Order, filed June 16, 2005. After careful consideration of the motion and applicable law, the court **denies without prejudice** Plaintiff's Motion for Temporary Restraining Order.

I. Factual and Procedural Background

Plaintiff Roy Dearmore ("Dearmore" or "Plaintiff") seeks to have the court enjoin Defendant City of Garland ("City" or "Defendant") from enforcing the City's Ordinance No. 5895 ("Ordinance"). Dearmore contends that he will suffer irreparable injury if the City is not enjoined. He maintains that the Ordinance violates his Fourth Amendment right to be free from unreasonable searches; Fifth Amendment right to procedural and substantive due process and privacy; and 14th Amendment rights.

Dearmore owns four properties in the City that he rents to various tenants. The City adopted the Ordinance on April 19, 2005. The Ordinance requires a person or entity that owns one or more rent houses to (1) submit an application to operate each rental property; (2) obtain an annual permit by paying the appropriate fee ($65); and (3) post and display the permit in a visible location inside the rental property. Garland, Tex., Ordinances ch. 32, § 32.09 (2005). The application and permit fee are to be paid no later than 60 days from the effective date of the Ordinance. § 32.09(C). The application is to include the name, address, telephone number and driver's license number of the owner, tenant and property manager. § 32.09 (B)((1)(a)(c). The City will inspect the property a least once a year, and failure of an owner to allow an inspection is an offense. § 32.09(F)(1)(3). When consent to inspect has been refused or cannot be obtained, the City is authorized to obtain a search warrant to conduct an inspection. § 32.09(F)(9).

Section 32.07 of the Ordinance requires that "a person who rents or leases three or more residential dwelling units to another person or persons which are part of a multifamily dwelling must obtain and maintain a valid multifamily license." Application for a multifamily dwelling license constitutes consent for the City's agents to enter and inspect individual dwelling units to determine compliance with the City's housing standards. § 32.07(E)(1). The application does not require the driver's license number of the owner, property manager or tenant. § 32.07 (B)(1). The Ordinance requires that all exterior windows designed to be opened on rented dwellings must be screened (§ 32.04(B)(5)); and all rented multifamily or single-family structures must be air conditioned. § 32.04(D)(5).

II. Motion for Temporary Restraining Order

There are four prerequisites for the extraordinary relief of a temporary restraining order or preliminary injunction. To prevail, Plaintiff must demonstrate (i) a substantial likelihood of success on the merits; (ii) a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law; (iii) that greater injury will result from denying the temporary restraining order than from its being granted; and (iv) that a temporary restraining order will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Canal Author v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (*en banc*). If a party fails to meet *any* of the four requirements, the court cannot grant the temporary restraining order or preliminary injunction. *Id.*

The court determines that Plaintiff has failed to meet the four requirements for a temporary restraining order, and his motion should be denied. Plaintiff contends that the Ordinance is invalid on its face because it authorizes warrantless inspections of private residences, has no rational basis and requires the disclosure of sensitive private information. Specifically, Plaintiff maintains that the City is violating his Fourth Amendment rights by requiring him to consent to warrantless searches of his rental property as part of the permit process. Plaintiff's Brief at 3. He further contends that his Fifth Amendment rights are violated because there is no rational basis of many of the Ordinance provisions, including requiring that rental property be air conditioned and the windows be screened. *Id.* Plaintiff maintains that owner occupied housing does not have to meet these requirement. *Id.* Plaintiff further maintains that privacy and due process rights are violated by the Ordinance requirement that he disclose his and the tenants driver's license number in the application. *Id.* Plaintiff asserts that he will suffer irreparable harm because these constitutional rights are being violated. He states that he is "faced with either complying with an unconstitutional statute, or resisting and facing criminal prosecution." *Id.* at 4.

Although Plaintiff offers some proof regarding irreparable harm, the court is not convinced that he has carried his burden on this element. Regarding the other three prerequisites for a temporary restraining order, he wholly fails to address them. Specifically, Plaintiff fails to demonstrate a substantial likelihood of success on the merits; that greater injury will result from denying the temporary restraining order than

from its being granted; and that a temporary restraining order will not disserve the public interest. Plaintiff simply states in a conclusory fashion that there is "little harm to the City of Garland in delaying enforcement of the statu[t]e, and it does irreparable harm to the Plaintiff whose constitutional rights are being violated." *Id.* at 4. Indeed, much of Plaintiff Dearmore's affidavit consists of arguments, conclusions and opinions, rather than facts in support of his temporary restraining order. *See* Affidavit of Roy Dearmore ¶¶ 4-8. In sum, Plaintiff fails to provide the necessary evidence and legal authority to demonstrate that he is entitled to a temporary restraining order. As Plaintiff has not met all the prerequisites for a temporary restraining order, the court **denies without prejudice** Plaintiff's Motion for Temporary Restraining Order.

It is so ordered this 28th day of June, 2004.

/s/
Sam A. Lindsay
United States District Judge

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(4)

No. 07-1527

Supreme Court, U.S.
FILED
AUG 7 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF GARLAND, TEXAS,

Petitioner,

v.

ROY DEARMORE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Is a Plaintiff a prevailing party under 42 U.S.C. § 1988(b) if:

1. The Plaintiff wins a preliminary injunction;

2. Based upon an unambiguous indication of probable success on the merits of the Plaintiff's claims as opposed to a mere balancing of the equities in favor of the Plaintiff; and

3. That causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits.

The federal circuit courts that have reviewed cases where a preliminary injunction is granted after a careful consideration of the merits and the injunction is not based on a mere balancing of the equities are unanimous in finding prevailing party status.

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I.

STATEMENT OF THE CASE

Garland's statement of the case makes the same omissions that their Statement of the Case to the United States Court of Appeals for the Fifth Circuit made. The first is that Garland did not object to the district court granting the preliminary injunction. There was no complaint about notice or lack thereof for a temporary injunction hearing until Garland filed its Motion to Alter or Amend the Judgment. Therefore, Garland has waived any procedural error in the district court's granting of the preliminary injunction. Second, the merits of the case are not an issue. Garland did not challenge the district court's ruling on the merits, but in response to the court's Order, and for no other reason, amended the Ordinance. Third, Garland notes that the temporary injunction bond was never filed by Dearmore. However, Garland does not explain why the bond was never filed. As found by the district court and the Court of Appeals, the bond was not posted because Garland's legal counsel convinced Dearmore's counsel that no bond was necessary as Garland would amend the ordinance to correct the unconstitutional provision. The district court did not "imagine" hypothetical circumstances in which the Fourth Amendment to the United States Constitution could be violated. The district court found that on its face the City's Ordinance violated the Fourth Amendment. Dearmore obtained the relief he sought, the declaration that the ordinance was unconstitutional. The district court's

preliminary injunction materially altered the legal relationship between the parties. Therefore, Dearmore is a prevailing party.

II.

REASONS FOR DENYING THE PETITION

A. There is no conflict among the circuits that a Plaintiff is a prevailing party where a preliminary Injunction is based upon an unambiguous indication of probable success on the merits of the Plaintiff's claims after more than a brief inquiry as opposed to a mere balancing of the equities in favor of the Plaintiff that causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits.

The federal circuit courts have all looked to *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) to determine prevailing party status. "The touchtone of the prevailing party inquiry is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 at 792-793. This is a test that will vary depending on the facts of each case and is not subject to a bright line rule.

The Fifth Circuit concluded that a Plaintiff is a prevailing party if the Plaintiff wins a preliminary injunction based upon an unambiguous indication of probable success on the merits of the Plaintiff's claims as opposed to a mere balancing of the equities in favor of the Plaintiff that causes the Defendant to moot the action, which prevents the Plaintiff from obtaining final relief on the merits. *Dearmore v. Garland*, 519 F.3d 517 at 524 (5th Cir. 2008), *cert. pet. filed* (2008), Petitioner's Appendix 14a.

Smyth v. Romero, 282 F.3d 268 (4th Cir. 2002), *cert. denied*, 537 U.S. 825 (2002), emphasized the necessarily abbreviated inquiry into the merits and the trial court's reliance on a balancing of the equities – weighing the harm to the Plaintiff and to the Defendant when granting or not granting the injunction. 282 F.3d 268 at 276. The Memorandum Order of August 29, 2006 denying Garland's Motion to Amend the Judgment was very clear that the original Order granting the temporary injunction was an unequivocal declaration that the Ordinance violated the Fourth Amendment to the United States Constitution and there were no equitable considerations.

> The court certainly could have used much stronger language, and, in retrospect, it should have, but the court used euphemistic language in part of its ruling to "let the City down easy." If this was a mistake, the court assures the City it will not happen again. Moreover, the language to which the court refers cannot be read in a vacuum. Other

> parts of the court's opinion unequivocally put the City on notice that the Ordinance was constitutionally infirm.

Dearmore v. Garland, 237 F.R.D. 573 at 577 (N.D. Tex. 2006) *affm'd* 519 F.3d 517 (5th Cir. 2008), *cert. pet. filed* (2008), Petitioner's Appendix 32a.

At the time the Court entered the preliminary injunction, the Court had made a final determination on the constitutionality of the ordinance. There were no fact issues left to be decided at that time. The facts were undisputed, and the Court finally decided the legal issue in the case – it just so happens that the procedural vehicle presented to the Court at that time was a Motion for a Preliminary Injunction. However, the Memorandum Opinion and Order and Preliminary Injunction left no doubt as to the resolution of the legal issues in Dearmore's favor. *Dearmore*, 237 F.R.D. at 578-579. Petitioner's Appendix at 35a-36a. The district court decided the case based on the face of Garland's ordinance. There were no additional facts that required adjudication by the district court. The preliminary injunction forecasted Plaintiff's success on the merits. It was not based on a balancing of the equities, or to maintain the status quo. It was clear when the preliminary injunction was granted that the district court believed that the ordinance was unconstitutional on its face.

Faced with this record, a record that the Fourth Circuit has never faced, it is readily apparent that there is no federal circuit court split on this issue ripe for consideration by this Court. Certainly the Eighth Circuit has indicated that many preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006) at 1086.[1] The Ninth Circuit granted prevailing party status in a case where the injunction sought by Plaintiff granted him all the relief he would have obtained after trial by a final judgment on the merits. *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003). The District of Columbia Circuit granted prevailing party status where the Plaintiff showed a change in the legal relationship, the judgment was rendered in the Plaintiff's favor and there was some judicial relief as opposed to merely a judicial pronouncement. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005). The Eleventh Circuit granted prevailing party status to a church group that challenged an ordinance requiring solicitation permits, obtained a

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[1] *Advantage Media v. Hopkins*, 511 F.3d 833 (8th Cir. 2008), *cert. denied* (2008), was an instance where the preliminary injunction granted did not result in a material alteration of the legal relationship of the parties, because even under the amended ordinance Advantage Media's signs were not approved. The preliminary injunction issued by Judge Lindsey did result in a material alteration of the legal relationship of the parties by declaring a provision of the Ordinance that affected Dearmore unconstitutional.

preliminary injunction and then the city repealed the ordinance, mooting the case. *Taylor v. Ft. Lauderdale,* 810 F.2d 1551 (11th Cir. 1987).

The Second Circuit has also found preliminary injunctions to be sufficient if the decision was on the merits. *Haley v. Patacki*, 106 F.3d 478 (2nd Cir. 1997). The Second Circuit like the D.C. Circuit, Eighth Circuit, Ninth Circuit and Eleventh Circuit said that it does not require an automatic denial of attorney's fees when a party receives a preliminary injunction but never obtains a final decision. The court must look to an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits. This is the test in *Buckhannon* and *Texas State Teachers Retirement System.* Some preliminary injunctions will have the effect of changing the legal relationship of the parties. Some will not. The Fifth Circuit's decision that a Plaintiff qualifies as a prevailing party when a preliminary injunction is granted based upon an unambiguous indication of inevitable success on the merits of the Plaintiff's claims, as opposed to a mere balancing of the equities in favor of the Plaintiff, and which causes the Defendant to moot the action thereby precluding the Plaintiff from obtaining final relief on the merits does not conflict with the other federal circuit court decisions.

B. No Resurrection of the Catalysis Theory

Garland makes much of the argument that this is merely a resurrection of the catalysis theory of prevailing party status, but does not provide any conflict among the circuits on the discrete issues in this case that are ripe for review.

The Fifth Circuit and the other circuits that have allowed prevailing party status after the granting of a preliminary injunction have not resurrected the "catalysis theory." *Buckhannon* held that the Defendant merely changing its conduct after the filing of a lawsuit was not enough to establish that the plaintiff is a prevailing party. *Buckhannon* clearly stated that a party cannot be deemed to have prevailed unless there has been an enforceable alteration of the legal relationship of the parties. The district court in this case issued a preliminary injunction that was a material, and indeed intended by the Court to be a permanent,[2] alteration of the legal relationship of the parties because it clearly and unambiguously held the Garland ordinance unconstitutional. The preliminary injunction altered the legal relationship of the parties. After the preliminary injunction was issued, Garland was prohibited from enforcing the unconstitutional provisions of the ordinance. Only after the court ruled did Garland amend the ordinance. As

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[2] *Dearmore*, 237 F.R.D. at 577. Petitioner's Appendix at 31a-32a.

stated by Judge Lindsey in his August 29, 2006 Order, " . . . the City did not voluntarily change or amend the Ordinance; it changed the Ordinance because of the court's Memorandum Opinion and Order and Preliminary Injunction." 237 F.R.D. at 577. Petitioner's Appendix at 31a. As the Fifth Circuit stated in affirming Judge Lindsey,

> We note that this is not a case in which the City voluntarily changed its position *before* judicial action was taken. Indeed if the City had mooted the case through amending the Ordinance before the court granted the preliminary injunction, then Dearmore could not qualify as a prevailing party under *Buckhannon* because it would have improperly invoked the "catalysis theory." The City, however, mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link between the District Court's issuance of the preliminary injunction and the City's subsequent amendment of the ordinance to moot the case.

519 F.3d at 525. Petitioner's Appendix at 17a. The Fifth Circuit ruling will have no effect on a Defendant voluntarily changing its conduct before a court makes a definitive ruling on the Defendant's conduct. This is not a catalysis case.

III.

RESPONSE TO PUBLIC POLICY ARGUMENT BY AMICI CURIAE

The Amici Curiae provide a public policy rationale that local governments, whose budgets are strained, will be subject to fees in cases where the merits of the case have not been assessed and would burden local governments.

However, as found by the Fifth Circuit, this was a merits based decision. Garland could have avoided attorney's fees altogether in this case if Garland had amended the ordinance prior to the district court's ruling. The Petitioner and Amici Curiae want to have a situation of heads we win, tails you lose. If they oppose the preliminary injunction and the court does not grant it, they win. If they oppose the preliminary injunction and lose, they still do not have to pay attorney's fees because they can then change their conduct and moot the case. This is clearly not what Congress intended by passing this fee-shifting statute and is an abuse of scarce judicial resources.

Realistically, in civil rights litigation enforcing constitutional and statutory rights where the plaintiff does not seek damages but only declaratory relief, the entry of a preliminary injunction or even a temporary restraining order in the Plaintiff's favor may effectively resolve the dispute. As in this case, a Defendant who loses an injunction may decide that additional litigation is futile and cease the challenged conduct rather than litigate to a final judgment. This

is not a catalysis theory case like *Buckhannon*, since the Plaintiff obtained a judicially enforceable alteration of the legal rights of the parties that has a judicial imprimatur and can be enforced against the defendant by a contempt proceeding. *Buckhannon*, 532 U.S. at 604. *Select Milk Producers*, *Taylor*, and *Haley* are all examples of where the temporary injunction provided all the relief the Plaintiff sought.

If the Court rules that preliminary injunctions such as the one in this case do not convey prevailing party status, there will be fewer civil rights cases brought seeking only declaratory relief because civil rights attorneys will not take the cases if there is no possibility of obtaining attorney's fees. A ruling as requested by Garland will inevitably require diligent civil rights attorneys to always seek damages in order to avoid a change of conduct by the defendant and subsequent mootness of the case. In such situations, judicial economy will not be enhanced.

Congress passed 42 U.S.C. § 1988 to privatize civil rights enforcement and conserve judicial resources. As noted in the Senate report concerning the passage of 42 U.S.C. § 1988,

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has

> little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court

Senate Report No. 94-1011 at 2. The Amici Curiae position is a *sub rosa* attempt to gut 42 U.S.C. § 1988 and the clear *public policy underlying the enactment of the fee-shifting statute*. Amici complain of fees, but it was the City that decided to roll the dice regarding a decision by the court. In this case, the City forced the use of scarce judicial resources, forced the plaintiffs to prove their case, and asked the court to decide the issue. The City cannot now be heard to complain that it should not suffer the consequences of its choice to litigate. All cities have the opportunity to correct their conduct prior to a judicial pronouncement. The court should not assist the City in playing a game of heads we win and tails you lose.

IV.

CONCLUSION

The Fifth Circuit decision does not conflict with the Fourth Circuit decision in a way that is ripe for review. The Fifth Circuit and the district court limited their decisions to the facts of the case before it. The Plaintiff must win a preliminary injunction based upon an unambiguous indication of probable success on the merits of the Plaintiff's claims as

opposed to a mere balancing of the equities in favor of the Plaintiff that causes the Defendant to moot the action which prevents the Plaintiff from obtaining final relief on the merits. This follows *Buckhannon* in finding prevailing party status when there is material alteration of the legal relationship between the parties. The Court should deny the Petition for Certiorari.

Respectfully submitted,

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(3)

FILED
AUG 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1527

In The Supreme Court of the United States

CITY OF GARLAND, TEXAS,
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ROY DEARMORE, et al.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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A. The decisions of the lower courts that have considered the issue presented here cannot be squared in a manner consistent with one another or with this Court's abandonment of the catalyst theory in *Buckhannon Bd. Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). 1

1. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the Fourth Circuit's decision in *Smyth*. 2

2. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the post-*Buckhannon* decisions from other circuit courts in which a preliminary injunction was held to be sufficient to confer prevailing party status. 5

3. A rule that deems a party who obtains no judicially-sanctioned relief other than a subsequently mooted preliminary injunction to be a "prevailing party" for an award of attorney's fees cannot be reconciled with this Court's decision in *Buckhannon*. 10

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PETITIONER'S REPLY BRIEF

In *Sole v. Wyner*, __ U.S. __ (2007), this Court saved for another day the question whether a party who obtains a preliminary injunction in the absence of a final decision on the merits of a claim for permanent injunctive relief is entitled to prevailing party status so as to permit the award of attorney's fees under federal fee shifting statutes. This case squarely presents that very issue. Respondents' brief in opposition fails to even mention *Sole*, much less tell the Court why the issue this Court itself acknowledged in that case is not important enough to warrant the attention of the Court now. Additionally, Respondents' brief dismisses without meaningful analysis the existence of an irreconcilable conflict between the lower courts that have addressed the issue, and fails to explain how this case does anything other than effect a post-*Buckhannon* revitalization of the catalyst theory. Because the issue presented in this case is recurring and important, this Court should grant certiorari to address it and to resolve the conflict among the lower courts.

A. The decisions of the lower courts that have considered the issue presented here cannot be squared in a manner consistent with one another or with this Court's abandonment of the catalyst theory in *Buckhannon Bd. Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

In the instant case, the Fifth Circuit established a rule that "an unambiguous indication of probable

success on the merits" in a preliminary injunction is sufficient judicial imprimatur to serve as the basis for an award of attorney's fees without running afoul of the now-abandoned catalyst theory. *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008). Whether the terms "unambiguous", "indication", and "probable" can logically coexist within the same rule without creating a legal oxymoron is a question best left for briefs on the merits. Nonetheless, the Fifth Circuit's decision in *Dearmore* cannot be reconciled with the manner in which the Fourth Circuit addressed the issue in *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). For that matter, *Dearmore* cannot be reconciled with the decisions of other courts that *have* given prevailing party status (or that say they would, under the right circumstances) to a party that obtains only a preliminary injunction, nor with this Court's decision in *Buckhannon*. Hence, the intervention of this Court to resolve those conflicts is necessary.

1. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the Fourth Circuit's decision in *Smyth*.

Respondents' assertion that the Fourth and Fifth Circuits are not split is based on the premise that the preliminary injunction considered by the Fourth Circuit in *Smyth* was merely the result of a balancing of the equities in that case, whereas the preliminary injunction in this case was somehow exclusively dependent on the merits of Respondents' arguments. Both assertions are demonstrably incorrect and both ignore the plain text of the district court's opinions in those cases.

Although not mentioned in Respondents' analysis of *Smyth*, in deciding the preliminary injunction, the district court in *Smyth* made a specific and unambiguous finding that Smyth would likely succeed on the merits of her claim. *Smyth v. Carter,* 168 F.R.D. 28, 32 (W.D. Va., 1996). In considering the merits of the plaintiffs' claims in that case, the district court carefully reviewed the applicable federal regulations, compared them against the policy challenged by the plaintiffs, and found the regulations and that policy "impossible" to reconcile. *Id.* ("Given the clear meaning of the regulations, impossible to square with [defendant's] contrary policy, the court finds that plaintiff likely will succeed on the merits on its statutory claim.")

In its subsequent decision granting the *Smyth* plaintiffs' request for attorney's fees, the district court reiterated the basis of its decision for issuing the preliminary injunction: "Th[is] court *primarily* based its decision to grant the plaintiffs' motion for a preliminary injunction on the plaintiffs' probability of success on the merits of their statutory claim. The court analyzed the defendant's policy in great detail, and found that it [violated] the applicable federal regulations." *Smyth v. Carter,* 2000 WL 1567168 (W.D. Va., 2000)(emphasis added). It is difficult to imagine how the district court in *Smyth* could have been more emphatic or unambiguous in articulating the reason it issued the preliminary injunction.

Respondents' discussion of the district court's basis for granting a preliminary injunction in this case is likewise misleading. Respondents errantly suggest that the preliminary injunction granted in this case

was based primarily on the district court's determination of their probable success on the merits, not on a traditional form of balancing test that assesses the various factors that typically govern whether a preliminary injunction should be issued. The district court's opinion granting the preliminary injunction demonstrates otherwise. In its *sua sponte* opinion granting the preliminary injunction, the district court stated that it had employed the Fifth Circuit's balancing test, saying:

> ". . . Plaintiff must demonstrate: (i) a substantial likelihood of success on the merits; (ii) a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law; (iii) that greater injury will result from denying the temporary restraining order than from its being granted; and (iv) that a temporary restraining order will not disserve the public interest."

Dearmore v. City of Garland, 400 F. Supp. 2d 894, 898 (N.D. Tex. 2005).

In then applying the balancing test, the district court stated:

> "Dearmore has further demonstrated that granting a preliminary injunction will subject the City to minimal harm, if any, while protecting him from irreparable harm which could not otherwise be adequately remedied at law. The City, with minimal effort, may amend its ordinance to include the owner's right of refusal of an inspection and include a warrant

> requirement upon that refusal. The court determines that the effect, if any, on the City's regulatory scheme would be negligible. Finally, Dearmore has demonstrated that a preliminary injunction will not disserve the public interest . . . ."

Id. at 905-06.

Respondents' dismissive attempt to reconcile the Fourth Circuit's opinion in *Smyth* with the Fifth Circuit's opinion in this case disregards reality; the district court in *Smyth* considered the merits of the plaintiffs' claims as much as, if not more than, the district court did in this case.

2. The Fifth Circuit's decision in *Dearmore* cannot be reconciled with the post-*Buckhannon* decisions from other circuit courts in which a preliminary injunction was held to be sufficient to confer prevailing party status.

Respondents claim that there is no split in the circuits because the other circuit courts that have reached the issue have awarded attorney's fees based on a preliminary injunction in the same manner as the Fifth Circuit. In fact, none of the post-*Buckhannon* cases cited by Respondents, except the Fifth Circuit, permit the award of attorneys' fees when the only "relief" obtained is a voluntary decision on the part of the defendant motivated by the issuance of a preliminary injunction.

Respondents point to two post-*Buckhannon* opinions of the circuit courts in which a plaintiff was awarded attorney's fees as a prevailing party based on having obtained a preliminary injunction. Unlike this case, in each of those cases the plaintiff received tangible, irreversible relief as a result of an order of the court. In neither of those cases was the plaintiff held to be a prevailing party merely because of a voluntary change in conduct by the defendant.

In *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), for example, the Ninth Circuit allowed the recovery of attorney's fees because the plaintiff received a preliminary injunction. *Watson*, 300 F.3d at 1096. When read in depth, though, *Watson* reveals that the plaintiff received much more than passing relief in the form of a subsequently mooted preliminary injunction. In fact, the plaintiff there received virtually everything he wanted from the suit in what effectively became, due to the change of events created by the preliminary injunction, a permanent and unalterable form of relief.

Watson involved a disciplinary proceeding against a deputy sheriff who sought to enjoin the County of Riverside from using a report the deputy had prepared without first receiving warnings that the statement could be used for disciplinary purposes against him. *Id.* at 1093. The district court enjoined the County of Riverside from using the disputed report in the disciplinary proceedings against the deputy. *Id.* at 1094. Following his disciplinary hearing, the case was rendered moot. *Id.* As a result of the injunction, the plaintiff received precisely the relief he sought in the suit – a disciplinary proceeding without the use of the

offending report. *See id.* The plaintiff received that relief not because of some voluntary action on the part of the County, but rather because the district court ordered that relief. *See id.*

Select Milk Producers, Inc. v. Johanns, 400 F.3d 939 (D.C. Cir. 2005), likewise involved a case in which the plaintiffs were awarded attorney's fees because they obtained a preliminary injunction. Like the plaintiff in *Watson*, though, the plaintiffs in *Select Milk Producers* received concrete and irreversible relief as a result of the district court's order, not because of a voluntary change in conduct due to the district court's merit-based ruling on the plaintiffs' request for a preliminary injunction. *See, Select Milk Producers, Inc.*, 400 F.3d at 943.

That case involved a retroactive rule issued by the Secretary of Agriculture. *Id.* at 941. The rule, if imposed, would have resulted in an immediate loss of $5,000,000.00 to the plaintiffs. *Id.* The district court granted the plaintiffs' motion for a preliminary injunction enjoining the Secretary from imposing the rule. *Id.* Thereafter, the Secretary issued a new rule which did not impose that loss on the plaintiffs, and the case became moot. *Id.* Thus, as a result of the district court's injunction, plaintiffs avoided a loss of $5,000,000.00. *See id.* at 943. Plaintiffs avoided that loss not because of the voluntary actions of the Secretary but because the district court enjoined enforcement of the offending rule. *See id.* Indeed, the court of appeals noted that the "preliminary injunction provided concrete and irreversible judicial relief to Milk Producers. . ." *Id.* at 948.

Dearmore is inconsistent with those cases because it permits the recovery of attorney's fees without corresponding concrete and irreversible relief. In that regard, the opinion of the Fifth Circuit also conflicts with the other post-*Buckhannon* opinions cited by Respondents. Specifically, in both *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006), and *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008) *cert. denied*, __ U.S. __, 76 U.S.L.W. 3557, the Eighth Circuit refused to allow attorney's fees based on a preliminary injunction where the plaintiff did not obtain the sort of concrete and irreversible relief that the plaintiffs in *Watson* and *Select Milk Producers* received.

Northern Cheyenne involved an injunction against the Secretary of Housing and Urban Development preventing the Secretary from disbursing funds to the State of South Dakota for construction of a shooting range. *Northern Cheyenne Tribe*, 433 F.3d at 1083. Ultimately, the case was resolved when HUD determined that the state was not entitled to the funds for the shooting range and the project was cancelled. *Id.* at 1084-85. Although the district court found that the plaintiff was likely to prevail on the merits, *id.* at 1084, the Eighth Circuit found that alone to be insufficient to permit the award of attorney's fees. *Id.* at 1086. Instead, the court noted in *dictum* that only those injunctions that provide some relief to the plaintiff might be sufficient to permit the award of attorney's fees. *See id.* (". . . the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim for permanent injunction is rendered moot by the impact of the

preliminary injunction . . . That type of preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits.")(internal citations omitted). The Eighth Circuit, however, has never ruled on such a case.

In *Advantage Media,* the district court enjoined the enforcement of a sign ordinance on the grounds that it was facially unconstitutional in a number of respects. *Advantage Media L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1048-49 (D. Minn. 2005). In so doing, the district court analyzed the ordinance and found that the plaintiff had demonstrated a strong likelihood of success on the merits of their claim, all as detailed by the district court in its discussion of the probable merits of the plaintiff's claims. *Id.* at 1046. Thereafter, the City of Hopkins amended its sign ordinance to remove the offending provisions. *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833, 835 (8th Cir. 2008). Following a jury trial in which the plaintiff failed to demonstrate that the offending ordinance caused it any damages, the plaintiff sought attorney's fees alleging that it was a prevailing party based upon the preliminary injunction and the court's finding that the ordinance was unconstitutional. *Id.* The district court denied the request, and the Eighth Circuit affirmed. *Id.* at 839. The court of appeals acknowledged that, "Advantage's lawsuit resulted in alteration of several potentially unconstitutional provisions of the Hopkins sign ordinance . . .", *id.* at 838, but determined that "a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party." *Id.* (quoting *Peter v. Jax*, 187 F.3d 829, 837 (8th Cir. 1999)).

As did the plaintiff in *Advantage Media*, Respondents in this case obtained, at best, a judicial pronouncement that they would likely prevail on their claims that the challenged ordinance violated the Constitution. In both *Dearmore* and *Advantage Media*, the challenged ordinance was voluntarily changed by the defendant to remove the challenged provisions. Advantage received all the relief that Respondents received in the instant case, yet the Eighth Circuit determined that Advantage was not entitled to an award of attorney's fees as a prevailing party.

Thus, the Fifth Circuit's opinion in *Dearmore* creates a multiple split in the circuits. As is set out above, it is inconsistent with the Fourth Circuit which declined entirely to award attorney's fees based upon a preliminary injunction. Likewise, Respondents' award of attorney's fees without obtaining concrete and irreversible relief from the district court makes the Fifth Circuit's opinion inconsistent with the D.C. Circuit, the Eighth Circuit, and the Ninth Circuit.

3. A rule that deems a party who obtains no judicially-sanctioned relief other than a subsequently mooted preliminary injunction to be a "prevailing party" for an award of attorney's fees cannot be reconciled with this Court's decision in *Buckhannon*.

In their response, the Respondents incorrectly describe the Fifth Circuit's test as to a prevailing party as being one who obtains an "unambiguous indication of inevitable [*sic*] success on the merits" of a request

for a preliminary injunction. Response to Petition for Certiorari, p.6. Ironically, Respondents' misstatement of the rule the Fifth Circuit actually announced in *Dearmore* illustrates just how much the *Dearmore* decision and others like it have given a rebirth to the "catalyst theory" this Court repudiated in *Buckhannon*. Even if the measure of the district court's assessment of success on the merits was one of inevitability – rather than probability – there is still nothing to distinguish the result in *Dearmore* from the result in the ordinary pre-*Buckhannon* catalyst theory case. A determination of "inevitable success on the merits" still falls short of the "concrete and irreversible relief" that other courts have found sufficient to make the recipient of a preliminary injunction a prevailing party, and it is far, far less than an actual determination of the merits made after the parties have had an opportunity to present their best case in something at least akin to a trial.

The incontrovertible truth is that, at the end of the day, Respondents left the district court empty-handed. All the district court did in this case was determine that the Respondents' pleadings could survive a motion to dismiss for failure to state a claim, perform an ordinary balancing of the equities, and then make a finding that the Respondents had shown a probability of success on the merits. *Dearmore v. City of Garland,* 400 F. Supp. 2d 894 (N.D. Tex. 2005). Even if the district court had done something more, even if it had indeed characterized Respondents' eventual success as inevitable, when it was all said and done, Respondents obtained nothing more than an order declaring the entire controversy moot (an order the Respondents did not challenge). While the district

court's opinion may well have motivated Petitioner to do exactly what the district court itself suggested (that is, amend the challenged ordinance so that the ordinance would no longer contain the defects the district court perceived it suffered), no matter how strong the district court's suggestion was or could have been, the fact remains that Petitioner was under no judicial *compulsion* whatsoever to change its ordinance at the time it did so. To the extent the Respondents ultimately obtained a bit of what they originally sought, what they got was due solely to a voluntary decision on the part of Petitioner. Petitioner simply took (it was thought at the time) the wiser course, the path of least resistance, a path that would save the district court, the Petitioner's taxpayers, and even the Respondents from the time, effort, money, and agony of battling over something that Petitioner decided was irrelevant to the overall effectiveness of a program of which the challenged ordinance provision was but a small part.

Therein lies the fundamental problem with *Dearmore:* At essence, *Dearmore* makes judicial *motivation* the equivalent of judicial *imprimatur*. In doing so, it pulls the catalyst theory from the grave dug for it by this Court in *Buckhannon* and creates from the corpse a new form of monster, one whose dangers are yet to be realized.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

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FILED
JUL 0 3 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1527

In the Supreme Court of the United States

THE CITY OF GARLAND, TEXAS
Petitioner,

v.

ROY DEARMORE, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit. Petitioner, City of Garland, Texas has consented to the filing of this brief. Respondents have not granted consent, thereby making this motion necessary.

As set forth in the accompanying brief, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association are membership associations of cities and attorneys who represent cities. These organizations share a keen interest in the proper interpretation and application of attorney's fees because of the critical impact that liability for attorney's fees can have on a city.

For these reasons, the National League of Cities, the International Municipal Lawyers Association, the Texas Municipal League, and the Texas City Attorneys Association respectfully request leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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July, 2008

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INTEREST OF AMICI CURIAE

The *amici* submit this brief in support of Petitioner, the City of Garland, Texas.[1] The National League of Cities (NLC) is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America. The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them through its Legal

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[1] The consent of the attorney for the petitioner was requested and obtained. The consent of the attorney for respondents was requested but refused. Thus, a motion requesting leave to file the instant brief precedes this brief. Counsel of Record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Rule 37.2 (b). In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici* or their members, have made a monetary contribution to the preparation or submission of this brief.

Advocacy Program. IMLA has appeared as *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. The Texas Municipal League (TML) is a non-profit association of over 1,090 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. The *amici* collectively work to better local governments.

SUMMARY OF THE ARGUMENT

This case concerns the proper construction of the term "prevailing party" in establishing whether a plaintiff is eligible for attorney's fees under 42 U.S.C. §1988(b). Specifically, the question presented is whether the term includes a party that has gained a preliminary injunction, but has failed to obtain a final decision on the merits for a claim for permanent injunctive relief. This question was expressly reserved by this Court in *Sole v. Wyner*, _ U.S. _ (2007), and this case presents an occasion for the Court to provide much-needed guidance on this unsettled issue. The resolution of this issue is of substantial importance to local governments because of the significant implications that liability for attorney's fees presents.

ARGUMENT

I. A Plaintiff Who Obtains a Preliminary Injunction Without a Final Decision on the Merits for a Claim for Permanent Injunctive Relief is Not a Prevailing Party.

In an action under Section 1983, a court "in its discretion, may allow the prevailing party . . . reasonable attorney's fees ..." 42 U.S.C. §1988(b). Not every favorable ruling during the course of litigation will confer prevailing party status. Rather, "[t]he touchstone of the prevailing party inquiry" is "the material alteration of the legal relationship between the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-73 (1989). An award for attorney's fees is appropriate "only in th[e] event that there [has] been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (quoting H.R. Rep. No. 94-1558, at 5 (1976)). This Court has found that a "prevailing party" is one who has obtained either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001). A "judgment on the merits" embodies the kind of "material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* (quoting *Tex. State Teachers Ass'n.* 489 U.S. 782 at 792-93).

To qualify for attorney's fees, the respondents must show that they have achieved a victory on the merits of their claim for permanent injunctive relief. They have not. All that the respondents obtained was a preliminary injunction. A preliminary injunction without more is not a "material alteration of the legal relationship of the parties," and does not confer prevailing party status.

II. A Preliminary Injunction Is Not a Meritorious Judgment That Changes the Legal Relationship Between The Parties.

Under this Court's precedents, a plaintiff's *likelihood* of prevailing is perhaps the most important factor in determining whether the plaintiff can obtain a preliminary injunction. *See, e.g., Sole, _ U.S. at _* (discussing probability of success factor); *Aschroft v. ACLU*, 542 U.S. 656, 666 (2004) (discussing likelihood of prevailing on the merits). In determining whether a plaintiff is entitled to a preliminary injunction, a court is called upon to assess the probability of the plaintiff's ultimate success on the merits, and whether the plaintiff will suffer irreparable harm. *Id.; Doran v. Salem Inn, Inc.*, 442 U.S. 992, 931 (1975). A preliminary injunction only serves to preserve the relative positions of the parties until a trial on the merits can be held. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Customarily, preliminary injunctions are "granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* They are not based on "findings of fact and conclusions of law" and a party is not "required to prove his case at a preliminary-injunction hearing." *Id.* (citing *Progress Dev. Corp. v.*

Mitchell, 286 F.2d 222, 233 (7th Cir. 1961) and *Indus. Bank of Wash. v. Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968).

The Fifth Circuit hinges its decision on the fact that the respondents' preliminary injunction was "based upon an *unambiguous* indication of probable success on the merits." *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008) (emphasis added). This holding incorrectly equates "probable success" with "success." The district court's ruling is rooted on the probability of success, and not on the merits of the case. The district court granted the preliminary injunction without any notice to the parties that it was considering the injunction. It did not hold a preliminary injunction hearing, and it accepted the pleaded facts of the respondents' complaints as true. Accordingly, the respondents' preliminary injunction is not a meritorious judgment that changes the relationship between itself and the city, and it does not confer prevailing party status.

III. The "Catalyst Theory" Is Not a Permissible Basis for the Award of Attorney's Fees.

The Fifth Circuit found that the respondents were a prevailing party because their obtaining a preliminary injunction "cause[d] the defendant to moot the action." *Dearmore*, 519 F.3d at 524. That holding necessarily implicates the "catalyst theory," which this Court invalidated in *Buckhannon*. The "catalyst theory" posits that a plaintiff is a prevailing party because the plaintiff's lawsuit was the catalyst for bringing about change in the defendant's action. In *Buckhannon*, this Court rejected the "catalyst theory"

because it "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. In reaching this conclusion, the Court explained that "a defendant's *voluntary* change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to confer prevailing party status. *Id.*

The "catalyst theory" is inconsistent with the spirit of fee-shifting statutes, such as Section 1988(b). It does not require a determination that the plaintiff's claims were in fact meritorious and that the relief that the plaintiff obtained was necessary to vindicate federally protected rights. Instead, the "catalyst theory" merely relies on whether a plaintiff "got his way." The city's voluntary alteration of its ordinance, while mooting the respondents' claim, is insufficient under *Buckhannon's* analysis to make the respondents a prevailing party.

Allowing a plaintiff to recover attorney's fees whenever a local government *voluntarily* changes its conduct not only undermines the purpose of Section 1988(b), but it would have a chilling effect on the ability of local governments to change their policies or ordinances due to the threat of incurring attorney's fees. The "catalyst theory" acts as a deterrent for a local government to voluntarily change its conduct – conduct that may not be illegal – because it could possibly be assessed attorney's fees. A local government's potential liability for litigation fees can be as significant as, and sometimes even more significant than, the potential liability on the merits.

See, e.g. Rivera v. Riverside, 763 F.2d 1580, 1581-83 (9th Cir. 1985), *aff'd*, 474 U.S. 917 (1985) (city ordered to pay civil rights plaintiffs $245,456.25 following a trial in which they recovered a total of $33,350 in damages); *Cunningham v. City of McKeesport*, 753 F.2d 262, 269 (3rd Cir 1985), *vacated by*, 478 U.S. 1015 (1986) (city ordered to pay $35,000 in attorney's fees in a case in which judgment for the plaintiff was entered in the amount of $17,000); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980), (en banc) ($160,000 attorney's fees awarded for obtaining $33,000 judgment); *Skoda v. Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981) ($6,086.12 attorney's fees awarded to obtaining $1 recovery).

Liability for attorney's fees under Section 1988 has significant implications for local government budgeting and delivery of services. Funds that must be allocated to the payment of attorney's fees are unavailable for other public purposes. Local governments live within budgets and lack the ability to confront fiscal shortfalls. When faced with financial shortfalls, they must rely upon measures that either raise taxes or detrimentally affect the essential services of government upon which the population relies. A rule that permits civil rights plaintiffs to recover attorney's fees even in cases where the merits of the case have not been assessed can only burden local governments with unwarranted liability for attorney's fees and costs of defending such litigation.

CONCLUSION

Amici fully acknowledge their obligation to pay attorney's fees under Section 1988(b) when a plaintiff

is a prevailing party. But to revive the "catalyst theory" and elevate a party who does not obtain a "judgment on the merits" to prevailing party status would obliterate this Court's jurisprudence. Accordingly, *amici* ask this Court to confine Section 1988 liability to its proper scope – cases in which plaintiffs obtain a meritorious judgment that their rights have been violated. For the above reasons, *amici* respectfully request this Court grant the City's Petition for Writ of Certiorari.

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